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# INTERNATIONAL LAW.

VOL. I.

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AND PARLIAMENT STREET

# COMMENTARIES

UPON

# INTERNATIONAL LAW.

BY

SIR ROBERT PHILLIMORE, D.C.L.

MEMBER OF HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL, AND  
JUDGE OF THE HIGH COURT OF ADMIRALTY.

Δίκη παλίων  
ἀσφαλὲς βᾶθρον, καὶ ὁμό-  
τροπος Εἰρήνη, ταμίαι  
Ἀνδρῶν πλούτου, χρύσεαι  
Παῖδες εὐβούλου Θεμίτος.

PIND. *Olymp.* xiii. 7.

Justice is the common concern of mankind.'—BURKE, vol. v. p. 275, *Thoughts on the French Revolution*.

'Rectè a viris doctis inter desiderata relatum est, jus Nature et Gentium, traditum secundum disciplinam Christianorum.'—LEJUNICZ, xxii. *De Notionibus Juris et Justitiæ*, p. 120.

VOL. I.

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# PREFACE

TO

## THE THIRD EDITION.

THE SECOND EDITION of this volume was published in 1871. In the Preface to that edition I gave a summary of the principal historical events which had affected International Law during the period between the publication of the First and Second Editions.

The notice of these events, as well as of those of a more subsequent date, has been incorporated in the text of the present edition.

Among these events may especially be enumerated :—

(1.) The Civil War in the United States, which gave rise to questions as to the inviolability of an envoy on board a neutral ship on the high seas ; as to the Law relating to blockade, contraband privateering, and generally the responsibility of a State for the acts of its citizens.

(2.) The temporary opening of the River St. Lawrence.

(3.) The permanent opening of the Danube.

(4.) The Sound dues, and the claims of Denmark with respect to them.

(5.) The Protocol to the Treaty of Paris, 1856, as



to invoking the arbitration of Friendly States previously to a Declaration of War.

(6.) The abolition of Domestic Slavery in the United States (1862.)

(7.) The change effected in the relations of Turkey to Europe.

(8.) Negotiations relative to the Isthmus of Suez.

I repeat here, however, some portions of the former Preface, which relates to general principles of International Jurisprudence.

These events have not induced me to change the opinions which I have expressed as to the cardinal principles of International Law. On the contrary, I venture to think that they furnish a strong corroboration of them.

The "violence, oppression, and sword-law," which have prevailed in part of Europe, ought not to shake conviction in the truth of these principles, while on the other hand they are confirmed by the consideration of events which, unconnected with the late war, have happened during the interval mentioned.

There always have been, and always will be, a class of persons who deride the notion of International Law, who delight in scoffing at the jurisprudence which supports it, and who hold in supreme contempt the position that a moral principle lies at its root.

The proposition that, in their mutual intercourse, States are bound to recognize the eternal obligations of justice apart from considerations of immediate expediency, they deem stupid and ridiculous pedantry. They point triumphantly to the instances in which the law has been broken (*a*), in which might has been

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(*a*). "Sed nimirum historiæ non tantum quæ juste, sed et quæ inique, iracunde, impotenter facta sunt memorant."—*Grotius, De J. B. l. 2. c. xviii. s. 7.*

substituted for right, and ask if Providence is not always on the side of the strongest battalions. "Let  
"our strength," they say, "be the law of justice, for  
"that which is feeble is found to be nothing worth"(b).

But in truth these objections are as old as they are shallow ; they leave untouched the fact that there is, after all, a law to which States, in peace and war, appeal for the justification of their acts ; that there are writers whose exposition of that law has been stamped as impartial and just by the great family of States, that they are only slighted by those upon whose crimes they have by anticipation passed sentence ; that Municipal as well as International Law is often evaded and trampled down, but exists nevertheless, and that States cannot, without danger as well as disgrace, depart in practice from doctrines which they have professed in theory to be the guide of their relations with the Commonwealth of Christendom.

The axiom, "*populus jura naturæ gentiumque violans suæ quoque tranquillitatis in posterum rescindit munimenta*," remains as true to-day as when it was written by its great author two centuries ago.

The precedents of crime no more disprove the existence of International than of Civil Law (c). The necessity of justice to the existence of society is not denied ; but it is not more obvious than the necessity of justice to the intercourse of States, the society of societies.

Rulhière, speaking of the Russian and Austrian

(b) *Wisdom of Solomon*, c. ii. v. 11.

(c) See, also, concluding remarks of the Third Volume.

intervention in the affairs of Poland, observes: "Il  
 " n'y avait cependant pour cette invasion aucun pré-  
 " texte légitime. Les puissances de l'Europe ayant  
 " toujours exercé entre elles le droit du plus fort dans  
 " toute l'étendue de sa barbarie, cherchent à couvrir  
 " leurs injustices et leurs violences de quelque appa-  
 " rence spécieuse; et à tous les commencemens de  
 " guerre, on voit éclore des volumes de sophismes.  
 " Ceux qui furent alors imaginés doivent d'autant  
 " moins être passés sous silence qu'ils ont eu dans  
 " la suite les conséquences les plus fatales" (*d*).

The whole question is placed upon its true basis  
 by one of the greatest masters of jurisprudence, whose  
 luminous treatise on the subject, though edited  
 in London, is too little read in this country.  
 " Ratio autem hujus partis, et juris est, quia hu-  
 " manum genus quantumvis in varios populos, et  
 " regna divisum, semper habet aliquam unitatem  
 " non solum specificam, sed etiam quasi politicam,  
 " et moralem, quam indicat naturale præceptum  
 " mutui amoris et misericordiæ quod ad omnes ex-  
 " tenditur, etiam extraneos, et cujuscunque rationis.  
 " Quapropter licet unaquæque civitas perfecta, res-  
 " publica, aut regnum, sit in se communitas perfecta,  
 " et suis membris constans, nihilominus quælibet  
 " illarum est etiam membrum aliquo modo hujus  
 " universi, prout ad genus humanum spectat: nun-  
 " quam enim illæ communitates adeo sunt sibi suffi-  
 " cientes sigillatim, quin indigeant aliquo mutuo  
 " juvamine, et societate, ac communicatione, inter-  
 " dum ad melius esse majoremque utilitatem: in-  
 " terdum verò etiam ob moralem necessitatem, et

"indigentiam, ut ex ipso usu constat. Hac ergo  
 "ratione indigent aliquo jure, quo dirigantur et  
 "rectè ordinentur in hoc genere communicationis et  
 "societatis. Et quamvis magna ex parte hoc fiat  
 "per rationem naturalem: non tamen sufficienter,  
 "et immediatè quoad omnia: ideoque aliqua specialia  
 "jura potuerunt usu earundem gentium introduci.  
 "Nam sicut in una civitate, vel provincia consuetudo  
 "introducitur jus, ita in universo humano genere po-  
 "tuerunt jura gentium moribus introduci. Eo vel  
 "maxime, quod ea, quæ ad hoc jus pertinent, et  
 "pauca sunt, et juri naturali valde propinqua et quæ  
 "facillimam habent ab illo deductionem adeoque  
 "utilem et consentaneam ipsi naturæ ut licèt non sit  
 "evidens deductio tanquam de se omnino necessaria  
 "ad honestatem morum, sit tamen valde conveniens  
 "naturæ, et de se acceptibilis ab omnibus" (e).

The suggestion contained in the last Protocol to the Treaty of Paris, 1856, that Christian States should not go to war without previously attempting to adjust their dispute by arbitration, has remained a dead letter, except perhaps in the case of Luxemburg. The Belligerents in the French and Prussian war, and in the Russian and Turkish war, would not listen to the suggestions of such an arbitration; though Turkey, *after* the defeat of Plevna, made some proposition of the kind.

The writer of these pages is anxious to acknowledge the service which he has derived from the works of his own countrymen, and from those of the United States of North America and the Continent of Europe, in the compilation of these volumes. To the works

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(e) *Suarez de Leg.*, lib. ii. cap. xix. § 9.

of Ward, of Manning, of Wheaton, and Story, he is under great obligations. To various writers on the European Continent, and especially to the learned Pfeiffer, his acknowledgments are also due. He also desires to draw attention to the Spanish works of Abreu and Pando, particularly of the latter; and to the following works, "Die Geschichte und Literatur der Staatswissenschaften," by R. von Mohl, Erlangen, 1855; an excellent essay by Mr. Hurd, an American jurist, on "Topics of Jurisprudence connected with Conditions of Freedom and Bondage;" a sketch by M. van Hogendorp, a Dutch jurist, of the Dutch School of Jurisprudence founded by Grotius; some Pamphlets on Maritime International Law by Professor Würm of Hamburg; "Fünf Briefe über die Fluss-Schiffahrt" u. s. w., Leipzig, 1858; new editions of Wheaton's "Elements of International Law," by Mr. Lawrence and by Mr. Dana, with ample notes; a new edition by Mr. Demangeat of the "Droit international privé" by M. Fœlix; Mancini, "Della Nazionalità," Torino, 1851; "The Law of Nations," by Sir. T. Twiss, 1863; an "Historical Account of the Neutrality of Great Britain during the American Civil War," by M. Bernard, Chichele Professor of International Law at Oxford, 1870, a work worthy of its very learned author; "Inaugural Lecture on Albericus Gentilis," by Professor Holland, 1874; "Discours prononcé, par M. Franck, au collège de France dans la séance d'ouverture de son cours, *De Droit de Nature et des Gens*," "Journal des Débats," Mardi, December 24, 1872; "Alberico Gentili," Speranza, Roma, 1876; "The Papacy and International Law," by Ernest Nys, Docteur en Droit, translation by Rev. P. A. Lyons, London,

1879; "First Platform of International Law," by Sir Edward Creasy, 1876; "Le Droit International," by Calvo, 1870; "The Law of Domicil," by Dicey, 1879; "Das Internationale Privat- und Strafrecht," von Dr. L. Bar, 1862; "Encyclopädie der Rechtswissenschaft," von Dr. Franz von Holtzendorff, Professor der Rechte in Berlin, 1873; and to the "Journal du Droit International Privé et de la Jurisprudence comparée," fondé et publié par M. Edouard Clunet.



*DEDICATION OF FIRST EDITION.*

TO

CHARLES JOHN VISCOUNT CANNING

IN AFFECTIONATE

ACKNOWLEDGMENT OF HIS LONG FRIENDSHIP,

AND IN SINCERE VENERATION FOR THE ILLUSTRIOUS NAME

WHICH HE WORTHILY BEARS,

THESE PAGES ARE INSCRIBED.





# PREFACE

## THE FIRST EDITION.

THE NECESSITY of mutual intercourse is laid in the nature of States, as it is of Individuals, by God, who willed the State and created the Individual. The intercourse of Nations, therefore, gives rise to International Rights and Duties, and these require an International Law for their regulation and their enforcement.

That law is not enacted by the will of any common Superior upon earth, but it is enacted by the will of God; and it is expressed in the consent, tacit or declared, of independent Nations (*a*).

The law which governs the external affairs equally with that which governs the internal affairs of States, receives accession from custom and usage, binding the subjects of them as to things which, previous to the introduction of such custom and usage, might have been in their nature indifferent (*b*).

Custom and usage, moreover, outwardly express

(*a*) *Grot. Proleg.* ss. 19-25. "Omni autem in re consensio omnium gentium lex nature putanda est." *Cic. Tusc.* i. 13.

(*b*) "Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo."—*Dig. lib. i. tit. iii.* 40.

the consent of nations to things which are *naturally*, that is by the law of God, binding upon them. But it is to be remembered that in this latter case, usage is the effect and not the cause of the Law (c).

International Jurisprudence has received since the civilization of mankind, and especially since the introduction of Christianity, continual culture and improvement; and it has slowly acquired, in great measure and on many subjects, the certainty and precision of positive law.

There can be few nobler objects of contemplation and study than to trace the gradual progress of this jurisprudence—the steps by which it has arisen from a few simple rules of natural law transferred from individuals to States, to the goodly and elaborate fabric which it now presents. The history of this progress has been written by Ompteda, Miruss, and Wheaton (d) in a manner which leaves the German, the English, and the French readers but little to desire. The subject receives some further notice in the body of this work, but the space within which this preface is necessarily confined, does not allow me to enter into details, which have received a very able exposition from the authors to whom I have referred; and I must content myself with inviting the attention of my readers to the principal epochs of this interesting and instructive portion of the moral and intellectual history of mankind.

I propose to cast a very rapid glance over the

(c) “Veruntamen hic etiam usus est effectus juris, non ipsum jus, quia hoc jus non ex usu, sed usus ex jure est.”—*Suarez, De Lege a terra et naturali, ac Jure Gentium*, l. i. c. xix. 8. *Cic. de Off.* l. 3, 5.

(d) By this author, both in English and French.

principal Jurists, whose labours have contributed to raise the edifice of International Law, and to conclude this preface with some observations on a subject, not altogether, it may be hoped, devoid of interest to all students of jurisprudence and history, but certainly not unworthy the attention of English readers—namely, the growth and cultivation of the science of International Law in this country.

• BEFORE THE CHRISTIAN ERA.

It is hardly necessary to say that the peculiar dispensation under which the Jewish nation was placed, and the rigidly prescribed mode of their dealings with foreign nations, render vain any attempt to trace in the history of that people the vestiges of International Jurisprudence (*c*).

The Egyptians held the persons of ambassadors sacred upon strictly religious grounds, and it appears to have been not unreasonably supposed that the Egyptian priests compiled a written *jus feciale*, which Pythagoras transplanted into Greece. Neither the source nor the nature of International Law can be said to have been unknown to the Greeks.

It was indeed a maxim of their wisest statesmen (*f*) that no State could subsist without acknowledging the rights of its neighbours, and the remarkable institution of the Amphictyonic League approached to the reality of an international tribunal, so far as the

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(*c*) *Michaelis, Mosäisches Recht*, Th. ii. *Israelitisches Staatsrecht*.

See the treatment of David's ambassador by the King of the Ammonites.—2 *Samuel*, c. x.

(*f*) *Wachsmuth, Jus Gentium quale obtinuit apud Græcos* (Berol. 1822).

*Vide post*, pt. i. ch. ii.

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great republic of the different States of Greece was concerned; but the stranger with whom there was no alliance was an enemy, and all Treaties of peace, like those formerly made between the Turks and Europeans, were for a limited period.

The *Collegium* and the *Jus Feciale* of the Romans are the most remarkable instances of regard for International justice ever exhibited by any nation, and the wonder is increased by the reflection, that this *Collegium* was the institution of a nascent State, which, in its very infancy, laid down the observance of right towards other nations, as a cardinal principle of its public policy.—The institution of the *recuperatores* also bears testimony to the same political integrity; how much, indeed, the practice of Rome in her maturity and decline was at variance with that principle of her early days, is well known.

But making, as history compels us to do, this admission, it must be remembered that if the *Jus inter Gentes* (g), strictly speaking, was violated by the practice of conquering Rome, yet the *Jus Gentium* was in reality established by her compilation of Jurisprudence; for in this stood transcribed eternally, if the word were applicable to a mortal work, those maxims of written Reason, those principles of Natural Law, which not only guide a State in its conduct towards Individual Foreigners, and are the root of *Comity*, or *Private International Law*, but which guide a State in its conduct towards other States, and

(g) The expression of *Lucan* as to the violation of the Laws of Embassy by the Egyptians is very remarkable; I do not remember to have seen it noticed:—

“Sed neque *jus mundi* valuit, neque fœdera sancta  
Gentibus.”—*Pharsal.* x. 471-2.

which constitute the most considerable foundation of Public International Justice.

### THE CHRISTIAN ERA BEFORE GROTIUS.

We enter next upon the Christian æra. Great and inestimable has been the effect of the doctrines of Revelation upon the Jurisprudence of Nations, though long retarded by the evil passions both of mankind generally and of the governors of men; yet the language, and the teaching, the system of a *representation* of different nations, the very forms of the assembling of the Councils of the Church, the notion of a common International Tribunal, the authority of the Pope during ages steeped in intellectual ignorance and moral grossness, contributed to preserve some idea of the Duties and Rights of Nations.

During the earlier part of the Middle Ages the Pope discharged the functions of International Judge and Arbitrator in the conventions of Christendom. The practice might have been imperfect, but the theory was sublime. The Right of the Pope to discharge these noble functions was almost unquestioned before the time of Boniface VIII., A.D. 1302. A great change was effected by the introduction and prevalence of the doctrine, that a distinction was to be taken between *temporal subjection ratione feudi*, and *subjection in temporal matters ratione peccati* (h). In Ecclesiastical Law the distinction was of little avail, and easily evaded, for in the Middle Ages the acts of an absolute irresponsible prince were easily brought within the category of sin (*ratione peccati*).

(h) *De Marca, De Concord. Sacerd. et Imper.* iv. c. xvi. 5.

But in *International Law*, the distinction was of the utmost importance, for it was now competent to Princes to tell their subjects, that there were circumstances under which the Papal Interdict was unlawful, and therefore invalid. The Pope lost his character of International Judge, and retained but for a season, and with difficulty, the character of International Arbitrator. That, too, had disappeared before the epoch of the Reformation, though up to that period all the foreign or international affairs of a State were considered and treated as matters appertaining solely to the prince, and with which the people had no concern.

It must be remembered that, even in the year 1493, Ferdinand and Isabella were confirmed in their possessions and discoveries in the New World by the Bull of the Pope, issued, as former Bulls had been, in virtue of his general territorial supremacy over the whole world; and that as late as the year 1701 the Pope complained, in his Consistory, that Austria had recognized the Ruler of Prussia under his new title of *King*. "not considering that it was the exclusive privilege of the Holy See to make kings" (i).

The Crusades introduced the principle of Intervention, both upon the general ground of religious sympathy, and upon the particular ground of reverence for those holy places which had been the scenes of our Lord's life and death—principles which, after the lapse of five centuries, are, while I write these pages, again most powerfully affecting the destinies of Europe. Though the Greek Empire, for many cen-

(i) *Lamberty, Mémoires*, t. i. 353, cited *Grünther*, ii. 445.

turies before its destruction, occupied no position which affects the history of International Jurisprudence, yet the conquest of Constantinople by the Turks operated very injuriously upon the *jus commune* of Christendom; because thereby an important portion of Christendom has been, up to a very recent period, exempted from its influence. Events, however, which are now happening, the great internal changes in the habits and laws of that extraordinary people, and their increasing connection with the Christian States, are evidently preparing the way for a general diffusion of International justice among nations of different religious creeds. During the Middle Ages, the most remarkable features of International Jurisprudence are the maritime codes of commercial towns, the institution of the Consulate, the laws and customs of Embassies.

#### ÆRA OF GROTIUS.

It is strange that the admirable and luminous treatise of *Suarez (k)*, *De Legibus et Deo Legislatore*, is not referred to by *Grotius* in his great work, because it appears from his other writings that he was acquainted (as indeed he could not but have been) with the works of this profound jurist. *Suarez* certainly cannot be claimed as a fruit of the Reformation, but at that epoch, from whatever cause, a new æra of International Jurisprudence opens upon us. Streaks of light from various countries, our own included, preceded the dawn of International Jurisprudence which appeared in the *Mare Liberum* of *Grotius*,

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(k) Born 1548, died 1617.



published in 1609 ; but its full meridian shone forth in his great work, *De Jure Belli et Pacis*, which was published in 1624.

It is scarcely too much to say, that no uninspired work has more largely contributed to the welfare of the Commonwealth of States. It is a monument which can only perish with the civilized intercourse of nations, of which it has laid down the master principles with a master's hand. Grotius first awakened the conscience of Governments to the Christian sense of International duty (*l*).

His work has been blamed for a want of systematic arrangement, and because the examples which illustrate the principles of law are taken chiefly from classical times and classical literature ; but these defects were, in truth, necessarily incident to the particular period at which he wrote. His work was defended from these charges by himself during his lifetime (*m*), and since his death has received a vindication from the pen of Sir James Mackintosh, which will not easily be surpassed (*n*).

I would fain linger on the merits of this famous master-builder of International Jurisprudence, this great legislator of the community of States, but I am admonished by diminishing space to proceed.

(*l*) "*Christianis placuit*," "*Christianis in universum placuit*," "*hoc perfecit reverentia Christiane legis*," &c.—*Vide post*, p. 40.

(*m*) In one of his latest letters to his brother, Grotius says of some one who had attacked his work: "Non probat quod, in illis libris *De Jure Belli ac Pacis*, utor *Paganorum* dictis: verum non ita ut utor, ut illa sequi satis esse *Christianis* arbitror, sed ut erubescant *Christiani* si minus præstent."—*II. Grot. Epistolæ*, Ep. 546, p. 920 (ed. Amstelod. 1687); and see *Proleg. to De Jure B. et P.*

(*n*) *Lecture on the Law of Nature and Nations*.

FROM THE PEACE OF WESTPHALIA, 1648, TO THE  
TREATY OF UTRECHT, 1713.

International Jurisprudence received considerable cultivation, a natural result from the increased intercourse between European nations, both in Europe and in their colonies.

*Puffendorf*, in 1672, published his once admired, and still celebrated work, *De Jure Naturæ et Gentium* : it had the merit of stating boldly that Natural Law was binding upon nations as well as upon individuals.

It would indeed be hardly fair to say that Grotius had altogether omitted Natural Law from the sources of International Jurisprudence ; but certainly *Puffendorf* is entitled to the merit of having supplied, by greater precision of statement, a philosophical defect upon this subject in the work of his predecessor. In other respects, however, the disparaging opinion of *Leibnitz* upon the work of *Puffendorf* has been generally confirmed ; it is, in truth, very inferior to the treatise of Grotius.

*Leibnitz*, whose *Codex Juris Gentium Diplomaticus* was published in 1693, manifested in his preface, and in other passages scattered about his works, a profound and just acquaintance with the principles of the science which we are considering, and left posterity for ever to regret that the fuller prosecution of it was swallowed up in the variety and vastness of his other studies.

THE INTERVAL BETWEEN THE TREATY OF  
UTRECHT, 1713, AND OF PARIS, 1763.

In 1740-43, *Wolff*, a disciple of Leibnitz, published the fruit of his enormous labours in nine quarto volumes, *Jus Naturæ Methodi Scientificè Pertractatum*, &c. An abridgment of his work, dealing separately with the question of *Jus Gentium*, subsequently appeared. He prided himself on accurately distinguishing the Natural from the Voluntary, Consuetudinary, and Conventional Law of Nations. His work had two great defects—the application of technical and mathematical terms to moral subjects, and the assumption of the false hypothesis that there existed *de facto* a great republic of which all nations were members. The latter error, however, does not in reality affect the force of his general position, and exists, perhaps, more in the pedantry of the language than in the spirit of the argument which he derives from it. The work of *Wolff*, with all its merits—and it had many—would probably have been both unread and unknown to modern readers, but for his abridger *Vattel*, who, departing in some points from his original, has melted down his ponderous quartos into the concise, readable, practical, sensible, but superficial work, which still retains its popularity. I must, however reluctantly, pass by *Montesquieu*.

*Bynkershoek* ranks next to his illustrious fellow-countryman Grotius, whom he delighted to call ὁ μέγας, and for whom, though not unfrequently dissenting from his opinions, he entertained the reverence which one great jurist naturally feels for another.

The *Quæstiones Juris Publici* appeared in 1737 ;—this work, and the two treatises by the same author, *De Dominio Maris* and *De Foro Legatorum*, are among the most valuable authorities which this science can claim.

#### THE INTERVAL BETWEEN THE TREATY OF PARIS, 1763, AND THE FRENCH REVOLUTION, 1789.

Italy furnishes us with *Lampredi* and *Galliani* ; Germany with *Moser* and *Martens*. The latter has obtained, not undeservedly, a place among the classics of International Law. But this interval is chiefly memorable in its effect upon this science, for the event of the independence of the North American Republics, accompanied by the distinct recognition of the authority and principle of Christian International Law in another quarter of the globe, and by a cultivation of that law which has already produced no less eminent professors of it than a *Story*, a *Kent*, and a *Wheaton*.

#### FROM THE FRENCH REVOLUTION, 1789, TO THE PRESENT TIME.

Germany has furnished many writers upon International Law. Two appear to me worthy of especial notice—*Klüber*, whose work, in spite of leaning to the doctrines of the Holy Alliance, is of great value ; and *Heffter*, who is still enjoying the reputation which he has acquired.

England, to pass by for the moment the achievements of her distinct International profession, has made no mean contributions to the cultivation of International Jurisprudence, in the writings of

*Bentham, Ward, Mackintosh, Mr. Manning, Mr. Reddie, Mr. Wildman, and Mr. Bowyer.*

*Private International Law (jus gentium)* has greatly flourished, thanks to the transfusion of Hertius, Huberus, Rodenburghius, Voet, and other Latin authors, into the well-arranged and carefully-reasoned works of *Story, Wächter, Savigny, and Fœlix*; of the first and the last of these authors we have but lately deplored the death.

It will be seen that I have been compelled to omit the mention of many authors, whom I have consulted, whose names will be found below in the catalogue of authorities, and to whom I owe a debt of much gratitude.

## HISTORY OF INTERNATIONAL JURISPRUDENCE IN ENGLAND.

It remains only to invite attention to a subject which, however little known, is not without interest to the historian, the jurist, and the statesman, namely, the existence in England of a distinct Bar for the cultivation of International Jurisprudence (o).

It cannot be denied that the Common Law of England has hitherto been, to a certain extent, like the territory in which it prevails, of an *insulated* and peculiar character. It must be acknowledged that it has borrowed less than any other State in Christendom from the jurisprudence of ancient and modern Rome. The fountains of wisdom, experience, and written reason, at which the European continent in former

(o) The following sketch, with slight alterations, has appeared in a letter from the author to Mr. Gladstone, published in 1848.

and America in later times have so largely drunk, were passed by in England with a hasty and scanty draught. The Gothic conquerors of continental Europe fell by degrees and from a variety of causes under the dominion of the laws of the vanquished. "Capta ferum victorem cepit" was eminently true of the restoration of the Civil Law during the middle ages in every country, but our own; and yet, for more than three centuries, England had been governed by the Civil Law. It is a very remarkable fact, that, from the reign of Claudius to that of Honorius (a period of about 360 years), her judgment-seats had been filled by some of the most eminent of those lawyers (*p*) whose opinions were afterwards incorporated into the Justinian compilations. But all germs of such jurisprudence would have perished with every other trace of civility under the rude incursions of Saxons and Danes, had not the tribunals of the clergy afforded them shelter from the storm (*q*). Occasionally, too, some maxims of the Roman Law, admitted either from their intrinsic merit, or through the influence of the clergy, enriched the then meagre system of English law. The Norman invasion was attended with a memorable change in the constitution as it then existed. The Bishop and the Sheriff had heretofore sat together in the Court of Justice, administering with equal jurisdiction the law upon temporal and spiritual offences; by the charter of William the Conqueror, the Eccle-

(*p*) *Papinian, Paulus, and Ulpian. Vide Duck, De Usu ac Autor. Juris Romani*, l. ii. c. 8, pars secunda, s. 7.

(*q*) *Blackstone*, vol. 4. 410; *Preface by Dr. Burn, to his Ecclesiastical Law*; *Millar's Historical View of the English Government*, vol. iii.; *Burke's Fragment of the History of England*.

siastical was separated from the Civil Court. This division has continued (with the exception of a temporary reunion in the reign of Henry I.) till the present period; the Ecclesiastical tribunal deciding, according to the rules and practice of the Civil and Canon Law, generally, on all matters relating to the Church, to the spiritual discipline of the laity, and, among other questions of a mixed nature, upon two of the most important kind, namely, the contract of marriage and the disposition of personal property after death (*r*). It is not necessary to dwell on the original reasons for assigning these mixed subjects to the jurisdiction of the Spiritual Courts. It was an arrangement at the time almost universally prevalent in Christendom.

The Ecclesiastical Courts, however, were not the only tribunals in which the Roman law was administered. In the High Court of Admiralty (*s*) (established about the time of Edward I.) and in the Courts of the Lord High Constable and the Earl Marshal (the Courts of Honour and Chivalry), the mode of proceeding was regulated by the same code.

The Courts of Equity also borrowed largely, and for a long time almost exclusively, from the same jurisprudence. Almost every Lord High Chancellor from Beckett to Wolsey—that is, from the Conquest to the Reformation—was an ecclesiastic; and it was a matter of course, that, like every eminent ecclesiastic of those days, he should be well skilled in the Civil

(*r*) *Burn's Preface*, xvii. *Lyndwood's Provinciale*, pp. 96-7, 261, 316 (ed. 1679, Oxford).

(*s*) *Blackstone*, vol. iii. p. 68; *Millar's English Government*, vol. xi. p. 338.

and Canon Law. Indeed, it was chiefly because they were deeply versed in this jurisprudence, though partly, no doubt, because their general attainments were far superior to those of the lay nobility, that the dignitaries of the Church were usually (*t*) employed in the foreign negotiations of this period (*u*). Nor can it be denied by the most zealous admirer of our municipal law that, during the period which elapsed from the reign of Stephen to Edward I., the Judges of Westminster Hall had frequent recourse to the Justinian Code; for in truth the writings of Fleta contain many literal transcripts of passages taken from the Digest and the Institutes (*x*).

Lastly, in the Courts of the two Universities the same system prevailed. Universities, which are not the least remarkable institutions of Christendom, had indeed originally been founded for the express purpose of teaching this science, and even in this country, where the feudal law so largely prevailed, had succeeded in kindling into a flame the precious spark which the schools of the cloisters and the

(*t*) *Hurd's Dialogues, Moral and Political*, vol. ii. p. 183; *Duck, De Usu, &c., Juris Civilis*, p. 364.

(*u*) By the Statutes of York Cathedral express provision is made for the absence of the Dean when employed beyond seas in the service of the State. The Bishop of Bristol, who was also Lord Privy Seal, was one of the negotiators of the Treaty of Utrecht; the last instance, I believe, of the kind.

(*x*) *Millar*, p. 325; *Preface to Halifax' Civil Law*; *Mackintosh's Law of Nature and Nations*, p. 52; *Lord Holt*, 12 *Mod. Rep.* p. 482: "Inasmuch as the laws of all nations are doubtless raised out of the ruins of the Civil Law, as all Governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed out of the Civil Law, therefore grounded upon the same reason in many things."



learning of the clergy had preserved from total extinction (*y*).

I pass now to the epoch of the Reformation. On the Continent, where the Civil Law was the basis of all municipal codes, the study of this science was scarcely, if at all, affected by this memorable event. In England it was otherwise. The professors of the Civil and the Canon Law belonged chiefly to the Ecclesiastical Courts, and were associated in the minds of the people partly with the exactions (*z*) of Empson and Dudley in the preceding reign, and partly with the authority of the Pope. Severe blows were dealt at the former, which were aimed solely at the latter system.

“The books of Civil and Canon Law were set aside to be devoured with worms as savouring too much of Popery,” says the learned Ayliffe in his history of the University of Oxford during the Visitation of 1547 (*a*). And Wood (*b*), after stating “That as for other parts of learning at Oxford, a fair progress was made in them,” observes, “The Civil and Canon Laws were almost extinct, and few or none there were that took degrees in them, occasioned merely by the decay of the Church and power of the Bishops.”

(*y*) See *Lynwood's Life, Biog. Brit. Dedication*; *Ridley's View of Civil and Ecclesiastical Law*, p. 118; *Zouche's Preface to his Treatise on the Punishment of Ambassadors, &c.*, to Henry, Marquis of Dorchester; *et vide infra*.

(*z*) Empson and Dudley justified their extortions by citations from the Civil Law. See *Hurd's Dialogues, Moral and Political*, vol. ii. p. 211, though they contain a very superficial and very imperfect sketch of the fortunes of the Civil Law in England.

(*a*) *Ayliffe's Oxford*, vol. i. p. 188.

(*b*) *Wood's Hist. and Antiquities of the University of Oxford*, vol. ii. b. i. s. lxxix. (ed. Gutch).

In 1536, Thomas Cromwell, Chancellor of the University of Cambridge, Secretary of State, and Vice-gerent of the King in Spirituals, was appointed (by the King's seal used for causes ecclesiastical) Visitor of that University; by the same instrument, he promulgated, in the name of the King, certain injunctions, of which the fifth was—

“That as the whole realm, as well clergy as laity, had renounced the Pope's right and acknowledged the King to be the supreme head of the Church, no one should thereafter publicly read the Canon Law, nor should any degree in that Law be conferred” (c).

About the same time, or rather earlier, similar injunctions were issued to the University of Oxford: these are preserved in the State Paper Office, and the corresponding injunction to the one just mentioned is as follows:—

“Quare volumus ut deinceps nulla lectio legatur palam et publicè per Academiam vestram totam in jure Canonico sive Pontificio, nec aliquis cujus conditionis homo gradum aliquem in studio illius juris Pontificii suscipiat, aut in eodem in posterum promoveatur quovis modo.” These injunctions (for there never was, as is commonly believed, any statutable provision on the subject) underwent some modification from the regulations of Edward VI. In 1535, Henry VIII. appointed certain Visitors, the chief of whom were Richard Layton and John London, LL.D., to visit the University of Oxford; these

(c) *Strype's Ecclesiastical Memorials*, vol. i. c. xxix. App. No. lvii., lviii.; *Cooper's Annals of the University and Town of Cambridge*, p. 375.

Visitors joined a Civil to the Canon Law Lecture in every Hall and Inn.

In 1549, a Visitation of the University of Cambridge took place under the auspices of the Protector Somerset. Bishop Ridley was appointed to be one of the Visitors, and one of the professed objects of this Visitation, according to Bishop Burnet (*d*), was to “convert some fellowships appointed for encouraging the study in Divinity to the study of the Civil Law; in particular, Clare Hall was to be suppressed.” Bishop Ridley found his task very difficult and odious, and wrote to the Protector that, to diminish the number of divines went against his conscience. Somerset replied: “We should be loth anything should be done by the King’s Majesty’s Visitors otherwise than right and conscience might allow and approve; and visitation is to direct things for the better, not the worse; to ease consciences, not to clog them;” and further, “my Lord of Canterbury hath declared unto us, that this maketh partly a conscience unto you that divines should be diminished; that can be no cause; for first, the same was met before in the late King’s time to unite the two Colleges together, as we are sure ye have heard, and Sir Edward North can tell, and for that cause all such as were students of the Law, out of the newly-created Cathedral Church, were disappointed of their livings, only reserved to have been in that *Civil College*. The King’s Hall being in a manner all Lawyers, Canonists were turned and joined to Michael House, and made a College of Divines, wherewith the number of Divines was much aug-

"mented, Civilians diminished. Now at this present  
 "also, if in all other Colleges where Lawyers be by  
 "the Statutes or the King's injunctions, ye do con-  
 "vert them or the more part of them to Divines, ye  
 "shall rather have more Divines upon this change  
 "than ye had before. The King's College should  
 "have six Lawyers ; Jesus College some ; the Queen's  
 "College and others, two apiece ; and, as we are in-  
 "formed by the late King's injunctions, *every College*  
 "*in Cambridge one at the least.* All these together  
 "do make a greater in number than the Fellows of  
 "Clare Hall be, and they now made Divines, and  
 "the statutes in that reformed Divinity shall not be  
 "diminished in number, but increased, as appeareth,  
 "although these two Colleges be so united. *And we*  
 "*are sure ye are not ignorant how necessary a study that*  
 "*study of Civil Law is to all Treaties with Foreign*  
 "*Princes and Strangers, and how few there be at this*  
 "*present to the King's Majesty's service therein," &c.*

Queen Elizabeth, among the Statutes which she  
 promulgated for the University of Cambridge, and  
 which have been recently published by Dr. Lamb,  
 enacted one, *De Temporibus Lectionum et Libris præ-*  
*legendis* (c. iv.), in which it is ordered, "Theologicus  
 "prælector tantum sacras literas doceat et profiteatur.  
 "*Jurisconsultus* Pandectas, Codicem, vel Ecclesiastica  
 "regni Jura quæ nos edituri sumus et non alia præ-  
 "leget." Since the reigns of Stephen and Henry II.,  
 when Vacarius first read lectures at Oxford on the  
 Civil Law, the Universities have made it their legiti-  
 mate boast that the study of the Roman Law found  
 its shelter and encouragement within their *pomæria*.  
 The history of almost every college will show that

the promotion of this study was an object which its founder had at heart. The statutes promulgated after the Reformation, during the royal visitations of the Tudors, as has already been shown, most carefully provided for the furtherance of the same end. The statutes of Edward VI. define more closely the knowledge requisite for a Doctor of Civil Law, and set forth the usefulness of such knowledge to the Church and State, as follows: "Doctor Legum—  
 " Doctor mox a doctoratu dabit operam legibus  
 " Angliæ, ut non sit imperitus earum legum quas  
 " habet sua patria, et *differentiam externi patriæque*  
 " *juris* noscat, et in solemnibus comitialibus quæ-  
 " tionibus unus qui id maximè certissimèque sciat  
 " facere ad finem quæstionum *quid in illis jus civile,*  
 " *quid ecclesiasticum, quid regni Angliæ jus* teneat,  
 " defineat, determinetque" (e).

In truth, the Universities were doubly interested in the preservation of this study: first, because the statutes, both those of the University and of the College, must, in cases of doubt, which not unfrequently arise, receive their interpretation from the Canon and Civil Law; the founders of Colleges (Chicheley and Wykeham for example) were often deeply versed in both branches of jurisprudence, and in cases tried before the Visitors of Colleges, many of the arguments have been drawn from these sources; but, secondly, inasmuch as the degrees conferred at

(e) These statutes are copied from Dr. Lamb's book, but they are, *mutatis mutandis*, the same as those given to Oxford, save that Oxford has some *post-statuta*, which Cambridge has not.—*Twyne's Collect.* vol. iv. p. 144, in *Turr. Schol. Oxon.*; *Lamb's Documents from MS. Library*, C. C. C. C., p. 127; see also a similar statute of Elizabeth's, 323.

the Universities were the necessary passport to the College of Advocates at Doctors' Commons.

Of the five professorships (*f*) which Henry VIII. founded on the spoils of the Church, one was instituted and endowed at each University for teaching the Civil Law. At Oxford, the lay prebend of Ship-ton was attached to the Professorship, and in Charles II.'s reign this endowment was expressly recognized and confirmed as an exception to the general law laid down in the Statute of Uniformity. The foundation of these Professorships in some measure counter-balanced the injury which the Civil Law received from the discredit into which the Canon Law had fallen (*g*). But this was not, I think, the sole or the principal circumstance which kept alive at this time the knowledge of this jurisprudence.

About this period a great and important change had begun to take place in the relations of the European communities towards each other, which rendered the preservation of the study of the civil law of great, and indeed, indispensable, necessity to these islands. During the reign of the Tudors, the English had been compelled, by a multitude of concurring causes (far too many for enumeration in these pages), to abandon their hopes of permanent conquests in France; nevertheless, at this very period, Great Britain began to assume that attitude with respect to foreign Powers which, from the days of Lord Burleigh to Mr. Can-

(*f*) Divinity, Hebrew, Greek, Civil Law, Medicine, founded 1540, confirmed 1546. John Story appears to have been the first Professor at Oxford appointed with a fixed salary.—*Wood, Hist. & Ant. of Oxford*, vol. ii. pt. ii. pp. 840, 859 (ed. Gutch).

(*g*) Luther openly burnt at Wittenberg the books of the Canon Law.—*Robertson's Charles V.* b. ii.

ning, it has been the constant endeavour of her wisest and greatest statesmen to enable her to maintain. She became an integral part, in spite of her "salt-water girdle" (*h*), of the European system, and daily more and more connected her interest with that of the commonwealth of Christendom. Every fresh war and revolution on the Continent, every political and religious movement, rendered that interest indissoluble.

The closer the bond of international intercourse became, the more urgent became the necessity for some International Law, to whose decisions all members of the commonwealth of Christendom might submit. The rapid advance of civilization, bringing with it an increased appreciation of the blessings of peace, and a desire to mitigate even the necessary miseries of war, contributed to make this necessity more sensibly felt. A race of men sprang up, in this and in other countries, whose noble profession it became to apply the laws of natural justice to nations, and to enforce the sanction of individual morality upon communities. But the application of these laws and sanctions to independent States, and still more any approach towards securing obedience to them, was no easy achievement. No one nation, it was obvious, had any right to expect another to submit to the private regulations of her municipal code; and yet, according to the just and luminous observation of Sir James Mackintosh, "In proportion as they approached to the condition of provinces of the same empire, it became almost as essential that Europe should have a precise and comprehensive

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(*h*) *Cymbeline*, act iii. sc. 1.

“code of the law of nations, as that each country  
“should have a system of municipal law” (i).

It was, as has been said, soon after the era of the Reformation that the science of International Law began to flourish on the Continent; and it has been said that this epoch was on the whole unfriendly to its study in this island. It remains to show by what means any vestiges of it have been preserved; and how a profession, whose duty it was to be “lawyers  
“beyond seas” (k), has been maintained in these islands, where honour and emolument have ever, with few exceptions, attended the knowledge and practice of a distinct and isolated system of municipal law.

Long before the Reformation there existed an ancient society of Professors and Advocates, not a corporate body, but voluntarily associated for the practice of the Civil and Canon Law. In 1587, Dr. Henry Hervey, Master of Trinity Hall in the University of Cambridge, purchased from the Dean and Chapter of St. Paul’s, for the purpose of providing a fixed place of habitation for this society, an old tenement, called Mountjoy House, on the site of which the College of Advocates at Doctors’ Commons now stands. In this sequestered place the study and practice of laws proscribed from Westminster Hall took root and flourished.

The Tudors, who, with all their faults, were unquestionably the most accomplished and lettered race which as yet has occupied the English throne, always looked with a favourable eye upon civilians, employed them in high offices of state, and set especial value on

(i) *Lecture on the Law of Nature and Nations*, p. 13.

(k) *Ayliffe’s Parergon Juris Canonici*, Introduction.



their services in all negotiations with foreign countries. Few, if any, matters of embassy or treaty were concluded without the advice and sanction of some person versed in the Civil Law. The enmity of Henry VIII. to the Canon, as has been observed, materially injured the profession of the Civil Law; but this was a result neither contemplated nor desired by that monarch. He founded, as has been said, a Professorship of Civil Law at both Universities, and in many respects befriended the maintenance and culture of this science. In 1587, Albericus Gentilis (*l*), an illustrious foreigner, was appointed to

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(*l*) Alberico Gentili was born at Sanginesio in the year 1552, and graduated as Doctor of Civil Law in the University of Perugia. Obligated to fly from his native country on account of his sympathies with the Reformation, he arrived in 1580 in England, and after acquiring a great reputation at Oxford, was appointed in 1587 to the Regius Professorship of Civil Law in that University. In the year following he began the publication of the most important of his numerous works, the *De Jure Belli*. In 1605 he was appointed Advocate for the King of Spain in the English Court of Admiralty. In 1608 he died in London, and was buried in the churchyard of St. Helen's Church, Bishopsgate.

Considerable interest in his life and writings has recently been taken both in Italy and in England. A memorial tablet, erected in St. Helen's Church, near the spot where he and his father were buried, was unveiled by H. R. H. Prince Leopold on the 7th of July, 1877. The epitaph on the tablet is as follows:—

D. O. M. S.

Alberico Gentili Ieto Clara atque Præstanti Familia in Provinc:  
Anconitan: Nato, Anno Ætat xxi Docturæ Ornamenta Perusii Adepto,  
Pauloque post in Nobilissima Ital. Civitate Asculo Judici, Aliisque  
Honoribus Magna Laude Perfuncto, Postremo Regiæ Acad: Oxoniensis  
per xxi Annos Legum Professori, Plurimis Editis Ingenii Monumentis,  
Celeberrimo Optimeque de Rep: Merito, Regiæ Catholicæ Hispan.  
Majestatis Subditorum Constituto (ob Eximiam Virtutem et Doctrinam)  
Advocato in Anglia Perpetuo, Hoc in Loco Una cum Optimo et Claris-  
simo Patre D. Mathæo Gentili Carniolæ Ducatus Archiatro, Filiolaque  
Dulcissima, in Christo Jesu Requiescenti H. M. S. Esthera Gentilis de  
Peigni Mar: Opt: Chariss: et Honoratiss:

Obiit Londoni Anno MDCVIII. D. xix Junii Ætatis LVIII.

Epitaphium hoc olim conscriptum, sed nunquam adhuc n Lucem

the Professorship of Civil Law at Oxford ; his work, *De Jure Belli*, was in truth the forerunner of Grotius. According to the emphatic language of the learned Fulbeck, he it was " who by his great industrie hath quickened the dead body of the civil law written by ancient civilians, and hath in his learned labours expressed the judgment of a great State, with the soundnesse of a deep phylosopher, and the skill of a cunning civilian. Learning in him hath showed all her force, and he is therefore admirable because he is absolute " (m).

During the earlier period of the Tudor sway ecclesiastics, many of them of high renown, were advocates of the civil law, but towards the close of Elizabeth's reign the profession became, and has ever since been, composed entirely of lay members (n). During this reign a nice question of International Law was raised in the case of the Bishop of Ross, ambassador to Mary Queen of Scots, and Elizabeth submitted to Drurye, Lewes, Dale, Aubrey, and Johnes, advocates in Doctors' Commons, that most difficult and important question as to the propriety and lawfulness of punishing an ambassador for exciting rebellion in the kingdom to which he was sent. Civilians were also

*Editum et Edaci Vetustate pene Abolitum, Vivi Insignissimi hic Viciniæ Tumulati in Memoriam, Quidam ex Amatoribus Jurisprudentiæ et Liberalium Artium Poni Curaverunt Anno Salutis MDCCCLXXVII.*

A new edition of the *De Jure Belli* has been published at the Oxford University Press, under the supervision of Dr. Holland, the Chichele Professor of International Law.

(m) *A Direction or Preparation to the Study of the Law*, f. 266 (Lond. 1620, 8vo.). *Irving's Introd. to the Civil Law*, s. 97.

(n) An unsuccessful attempt was made in Highmore's case (8 *East's Reports*, 213) to obtain a mandamus from the archbishop commanding the Dean of the Arches to admit Dr. Highmore a member of the College of Advocates. This was in 1807.

consulted as to the power of trying (*o*) the unhappy Mary herself; and Mr. Hallam seizes on the facts, with his usual sagacity, to demonstrate that the science of International Law was even at this period cultivated by a distinct class of lawyers in this kingdom. James I., who, besides his classical attainments, imbibed a strong regard for the Civil Law from his native country, protected its advocates to the utmost that his feeble aid would extend (*p*). To this monarch Sir Thomas Ridley dedicated his *View of the Civil and Ecclesiastical Law*, a work of very considerable merit and of great learning; it had for its object to demonstrate the pettiness and unreasonableness of the jealousy with which the common lawyers had then begun to regard the civilians, and the law which they administered at Doctors' Commons—and it appears to have been by no means unattended with success; for it was perhaps a consequence of this able work that, about the year 1604, each of the two Universities was empowered by royal Charters to choose two members to represent them in Parliament, and by the same Charters they were admonished to select such as were skilful in the "Imperial Laws."

The reign of the First Charles produced two civilians of great eminence, whose reputation, especially

(*o*) *Constitutional History*, vol. i. pp. 218, 219; *Strype*, 360-362.

(*p*) Cowell, who was Professor of Civil Law at Cambridge, had acquired a profound knowledge of this law, and had in consequence been chosen Master of Trinity Hall (an office at this moment filled by the learned Judge of the Arches), published a dictionary of law, in imitation of *Calvin's Lexicon Juridicum*, a work of much learning, but containing extravagant dicta about the king's prerogative. James shielded him from the wrath of Coke.

that of the latter, was as great on the Continent as in these islands—Arthur Duck and Richard Zouche. The former steadily adhered to the fortunes of his unhappy sovereign; and his work, *De Usu ac Autoritate Juris Civilis*, has never ceased to maintain its deserved authority. Zouche, who held several high appointments, submitted to the authority of the Parliament (r). In 1653, the famous case of the Portuguese ambassador happened: Don Pantaleon de Sa, having deliberately murdered an English subject in London, took refuge in the house of his brother, the Portuguese ambassador. That high functionary insisted on the exemption of his brother from punishment on account of the inviolable character which the law of nations impressed upon the dwelling of an ambassador. Cromwell, however, caused him to be tried before a commission composed of Sir H. Blunt, Zouche, Clerk, and Turner, Advocates of Civil Law, and others; before whom he was convicted of murder and riot, and for these offences was executed at Tyburn. On this occasion Zouche wrote a very able and learned treatise, entitled, *A Dissertation concerning the Punishment of Ambassadors who transgress the Laws of the Countries where they reside, &c.* This civilian was also the author of several other treatises on public law, the most celebrated of which was entitled *Juris inter Gentes Quæstiones*, a book which is to this day of high authority and constant reference by all jurists both in Europe and America.

During the reign of Charles II. various causes con-

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(r) Zouche had received a patent from King James, assigning to him a stipend of 40*l.* per annum, and all emoluments and privileges enjoyed by "Albericus Gentilis, Frauncis James, and John Budden." A copy of this patent is to be found in *Rymer's Fœdera*.

spired to extend and strengthen the influence of the Civilians. The restoration of the orders and discipline of the Church—the rapid growth of commerce and its consequences, augmentation of *personal* property and increase of shipping—the creation of a navy board (s), and widely spreading relations with foreign States—the two Dutch wars, and the personal merits of the great Civilian of the day, Sir Leoline Jenkins—all contributed to produce this result.

“If,” says Sir Robert Wiseman, Advocate-General, writing in 1680, “we look no farther back than “twenty years ago, we shall remember the Civil “Law did so far spread itself up and down this “nation, that there was not any one county which “had not some part of the government thereof “managed and exercised by one or more of that profession, besides the great employment and practice “it had in the Courts in London. So that it being “thus incorporated, and, as I may say, naturalized “by ourselves into this Commonwealth, it ought not “to be reputed or looked upon by us a stranger any “longer” (t).

I come now to the last period, that which elapsed between the Revolution of 1680 and the present time. During this interval the profession of the Civil Law has been sustained by a succession of advocates and judges, who may challenge comparison with their brethren of Westminster Hall, and who have done good service to the State, both in her domestic tribunals, in her courts of the law of nations, and in her pacific intercourse with foreign nations. Nobody

(s) *Vide Pepys' Memoirs, passim.*

(t) The extract is taken from a treatise called *The Law of Laws, or the Excellency of the Civil Law.*

acquainted with the history of our country since the Revolution can be wholly ignorant of Sir Leoline Jenkins, Sir George Lee, Sir G. Hay (*u*), Sir William Wynne, Dr. Lawrence, and Lord Stowell.

The biography of Sir Leoline Jenkins contains a history of the foreign affairs of this kingdom from the breaking out of the first Dutch war (1664) to the Peace of Nimeguen (1676-7), which he negotiated in concert with his illustrious colleague, Sir W. Temple. He filled various high offices, those of Member of Parliament, Judge of the High Court of Admiralty, Judge of the Prerogative Court of Canterbury, Principal of Jesus College, Oxford, Ambassador, Secretary of State.

Throughout the works (*v*) of this great jurist are scattered tracts upon various questions of Public and International Law, rich in deep learning and sound reasoning, and consequently forming a mine from which all subsequent jurists have extracted materials of great value. His acquaintance with the Civil Law was deep and accurate, as he had opportunities of evincing upon several occasions; and he often lamented, we learn from his biographer, that the Civil Law "was so little favoured in England, where all "other sciences met with a suitable encouragement" (*x*).

"His learned decisions," I quote from the same source (*y*), "rendered his name famous in most parts

(*u*) *Vide Walpole's History of Last Ten Years of George II.*, vol. ii., for an account of Dr. Hay's eloquence.

(*v*) I believe the Colleges of Jesus and All Souls contain MSS. yet unpublished of Sir L. Jenkins, which, it is to be hoped, will one day see the light.

(*x*) *Life of Sir L. Jenkins*, p. xi. preface.

(*y*) *Ib.* p. xiii. and vol. ii. p. 741. He advised the Duke of York as to

“ of Europe (there being at this time almost a general  
 “ war, and some of all nations frequently suitors to  
 “ this Court), and his answers or reports of all  
 “ matters referred to him, whether from the Lords  
 “ Commissioners of Prizes, Privy Council, or other  
 “ great officers of the kingdom, were so solid and  
 “ judicious as to give universal satisfaction, and often  
 “ gained the applause of those who dissented from  
 “ him, *because they showed not only the soundness of*  
 “ *his judgment in the particular matters of his profes-*  
 “ *sion, but a great compass of knowledge in the general*  
 “ *affairs of Europe and in the ancient as well as*  
 “ *modern practice of other nations.* Upon any ques-  
 “ tions or disputes arising beyond sea between His  
 “ Majesty’s subjects and those of other Princes, they  
 “ often had recourse to Dr. Jenkins. Even those  
 “ who presided in the seats of foreign Judicatures in  
 “ some cases applied to him to know how the like  
 “ points had been ruled in the Admiralty here, and  
 “ his sentences were often exemplified and obtained as  
 “ precedents there, &c.” “ For his opinion, whether  
 “ in the Civil, Canon, or Laws of Nations, generally  
 “ passed as an uncontrovertible authority, being  
 “ always thoroughly considered and judiciously  
 “ founded ” (z).

his title to the Seignury of Aubigné, on the death of the Duke of Richmond, vol. ii. p. 704. He advised upon the claim of the Crown of England to the dominion of the narrow seas and the homage due to her flag; upon the Electoral Prince Palatine’s settlement; on the effect of a settlement of property made by Maurice Prince of Orange; as to the succession to the personal estate of the Queen Mother of France, and on many other cases of great importance and delicacy, in which the knowledge of a civilian and publicist was required. See vol. ii. pp. 663, 673, 674, 709, &c.; see also *Temple’s Memoirs*.

The Law which governs the disposition of the personal estates of intestates, commonly called the Statute of Distributions (*a*), was framed by Sir L. Jenkins, principally upon the model of the 118th Novel of Justinian.

It was also by the influence of this distinguished member of their body that, after the Fire of London, the Advocates of Civil Law obtained a share of certain immunities enjoyed by other branches of the Bar. The Rescript of Charles II. on the subject begins, "Charles R. The Society of the Doctors at Civil Law, Judges and Advocates of our Court now settled at Doctors' Commons, in London, having to their great charges rebuilt the same, &c. &c. And *we knowing the usefulness of that profession for the service of us and our kingdom in many affairs,* found just cause to assert their exemption from payment of taxes, burdens, and impositions in the same manner as the Societies of the Serjeants' Inn are and have used to be."

The death of Jenkins happened soon after the accession of James II. After the abdication of that Monarch the Civilians were consulted upon very nice question of International Law, to which reference is made at length in this work (*b*). In the reign of Anne, Sir John Cooke, a distinguished Civilian, and Dean of the Arches, was one of the Commissioners for the Treaty of the Union with Scotland; and everybody acquainted with the Treaty of Utrecht is aware that the Civilians were continually consulted by the Crown upon the framing of the different Articles contained in it.

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(*a*) 22 & 23 Car. II. c. 10.

(*b*) *Vide post*, pp. 359, 507.



Thus, the Queen, in her instructions to Lord Bolingbroke, "whom we have appointed to go to France," speaking of the exchange or alienation of Sicily by the House of Savoy, observes, "As for the second point which you are to adjust, as far forth as is possible, we have directed what has been prepared by the Civilians upon this subject to be put into your hand" (c). The reigns of the first two Georges produced Sir George Paul, Sir Henry Penrice, and the two Bettsworths, Judges of great learning and ability; but I pass on to the date of 1729, when Sir George Lee first entered upon his career of distinction. This able Civilian was an active enemy of Sir Robert Walpole; he was also Treasurer to Frederick Prince of Wales, and deservedly venerated for the learning, accuracy, and clearness of his decisions in the Prerogative and Arches Courts, in both of which tribunals he presided as Judge. But he enjoys also no inconsiderable European fame; for he was the principal composer of a State Paper (d) on a great question of International Law—the Answer to the Memorial of the King of Prussia, presented to the Duke of Newcastle by Mr. Mitchell, and, to borrow the words of his biographer (e), "it has universally been received and acknowledged throughout Europe as a correct and masterly exposition of the nature and extent of the jurisdiction exercised over the ships and cargoes of Neutral Powers by Courts of the Law of Nations, established within the Terri-

(c) *Bolingbroke's Correspondence*, vol. i. p. 4, note.

(d) It is printed in the *Collectanea Juridica*.

(e) See *Dr. Phillimore's Preface to Sir G. Lee's Reports*, p. xvi. See also an elaborate panegyric by *Dr. Harris*, in the Preface to his translation of the *Institutes of Justinian*.

“tories of belligerent States. Montesquieu characterizes it as *réponse sans réplique*, and Vattel terms “it *un excellent morceau du droit des gens*.” To that memorial indeed another name was affixed, the name of one who was not indeed a member of the College of Advocates, but who was destined to be among the few luminaries of Jurisprudence in our island, and able to vie with those which have shone upon the Continent — of one whose boast it was that he had early and late studied the Civil Law, and who built upon this avowed basis, and on his knowledge of the writers on Public Law, that goodly fabric of Commercial Jurisprudence which has since indeed received addition and ornament, but which owed its existence to a mind saturated with the principles of the Roman Law. This great man was then Mr. Murray, afterwards Lord Mansfield. For comprehensive grasp of mind, for knowledge of general principles of law, and of their particular application in various countries, this illustrious magistrate was second only to one, with the mention of whom I shall presently close my brief notice of distinguished Civilians (*f*).

But, to be historically correct, I should first advert to a circumstance of great importance in its relation to the history of the Advocates of Civil Law. Sir G. Lee died in 1756; in 1768 George III. granted to this Society a formal charter, by which it became a legally recognized body corporate. The charter recites, that the members of the College at Doctors' Commons had devoted themselves to the study of the Civil and Canon Law, and were either advocates or

(*f*) Want of space compels me reluctantly to omit all mention of such judges as Sir E. Simpson and Sir G. Hay.

judges in the Ecclesiastical and Admiralty Courts, and that they had for "centuries past formed a *"voluntary society,"* &c.; and prayed the King to be pleased, by letters patent under the great seal, "to incorporate them and their successors by the name, style, and title of the College of Doctors of Law, exercient in our Ecclesiastical and Admiralty Courts." The charter goes on to say: "We having taken the said petition into our royal consideration, and being willing to give all fitting encouragement to the said study," &c., and then proceeds to constitute, with every imaginable formality of expression, the College a legal corporate society, with visitors and power of making bye-laws, &c.

I return to the mention of that Civilian whose reputation as a jurist overtopped even the great name of Lord Mansfield. In 1779 Dr. Scott enrolled his name among the advocates of Doctors' Commons; he is now better known by his well-deserved title, Lord Stowell, of whom it may be indeed emphatically said that he left

*"Clarum et venerabile nomen  
Gentibus."*

And the remainder of the line is scarcely less his due—

*"Et multum nostræ quod profuit urbi."*

The history of Lord Stowell is familiar to the present generation. His great natural endowments—his long residence at the University—the admirable use he made of the opportunities which such residence affords for storing the mind with all kinds of knowledge—his vast and varied intellectual attainments—the mature age at which they were brought into the fray of active life—the keen insight into human

nature—the judicial character of his wise, patient, and deliberative mind—the marvellous power of lucid arrangement, educing order and harmony from the most perplexed and discordant matter—the clear and beautiful robe of felicitous language and inimitable style which clothed all these high attributes—the awful crisis and convulsion of the civilized world which called for the exercise of these powers in the judgment-seat of International Law at the very time when he was elevated to it—the renown of his decisions over both hemispheres (*g*)—the great age to which he enjoyed the full possession of his faculties—all this is matter of too recent history to require a more detailed enumeration. “*Testes vero jam omnes oræ atque omnes exteræ gentes ac nationes: denique maria omnia tum universa, tum in singulis oris, omnes sinus atque portus*” (*h*). With this justly venerated name I close my catalogue of English Civilians, omitting, not without regret, all mention of Dr. Strahan, the translator of *Domat*; of Dr. Harris, a Civilian of great eminence, the translator of *The Institutes*; of that learned and able Judge, Sir William Wynne; and of Dr. Lawrence, the well-known friend of Burke. To the latter, indeed, ample justice has been done by Lord Brougham in his *Characters of British Statesmen* (*i*).

I have endeavoured to give a sketch of the fortunes of International Law in this country, and to illustrate them by some comments on the most distinguished disciples of that jurisprudence. My sketch has been

(*g*) *Vide passim the American Reports.*

(*h*) *Cicero, pro Lege Manilia.*

(*i*) See also *Horner's Memoirs*, vol. i.

necessarily meagre and imperfect ; it would otherwise have transgressed the limits of my Preface ; and I have been compelled, especially during the latter period, to pass by in silence many English Civilians who would have deserved commemoration in a larger work.

### CONCLUSION.

In conclusion, the Author trusts that, in any judgment which may be passed upon this work, it will be recollected that it is an endeavour, upon a larger scale than has hitherto been attempted in England, to reduce, in some measure at least, to a system, the principles and precedents of International Law ; and that this is a task which the very nature of the materials renders extremely hard : inasmuch as it is very difficult so to arrange them as to avoid on the one hand a vague unsatisfactory generality, and on the other an appearance of precise mathematical accuracy, of which the subject is not susceptible.

The Author is anxious to express a sincere hope that others of his fellow countrymen, profiting by what may be useful, avoiding what may be erroneous, supplying what may be defective in his labours, may by them be stimulated to undertake and execute a better treatise upon the same subject.

It is by such gradual additions and painful accumulations that the edifice of this noble science may one day be completed, and the Code of International Jurisprudence acquire in all its branches the certainty and precision of Municipal Law. Such a result would be greatly instrumental in procuring the general recognition and ultimate supremacy of Right in the

intercourse of nations, and, with the blessing of God, in hastening the arrival of that period when the aspiration of the Philosopher and the vision of the Prophet shall be accomplished. “Nec erit alia lex  
“Romæ alia Athenis ; alia nunc, alia posthac, sed et  
“omnes gentes et omni tempore una lex et sempiterna  
“et immutabilis continebit.” (*Cicero, De Re Publica*, l. 3, c. 22.) “Nation shall not lift up sword against  
“nation, neither shall they learn War any more.” (*Isaiath*, c. ii. v. 4.)



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*Errata.*

P. 3, note (*c*), line 2, *for* lib. xi. ch. 8, s. 2, *read* lib. ii. c. viii. s. 2.

P. 26, note (*o*) *for* Instit. de Legit. Agnat. l. iii., *read* Instit. lib. i. t. xv. 3.

**COMMENTARIES**  
**UPON**  
**INTERNATIONAL LAW.**



### *Errata*

P. 451, line 16, *for* "the United States," *read* "the House of Representatives of the United States"

" " " *for* "an Act," *read* "a Bill"

" 452, " 11, *after* "this Act," *add* "But this whole section,"  
Mr. Morse observes, "was stricken out by  
"the Senate, which substituted the third  
"section of the Act of Congress, July 27,  
"1868; the amendment of the Senate was  
"concurred in by the House, and the Act  
"as amended became the law" (zz)

Note z, line 3, *for* "is novel," *read* "would have been novel"

4, *for* "would be," *read* "would have been"

zz, Morse on "Citizenship by Naturalization," *American Law Register*, Oct. and Nov. 1879, p. 668



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# COMMENTARIES

## UPON

# INTERNATIONAL LAW.

## CHAPTER I.

### INTRODUCTION.

I. THE great community, the universal commonwealth of the world, comprehends a variety of individual members, manifesting their independent national existence through the medium of an organised government, and called by the name of States (*a*).

II. States in their corporate capacity, like the individuals which compose them, are (subject to certain limitations) free moral agents, capable of rights, and liable to obligations (*b*).

(*a*) "Communitas, quæ genus humanum aut populos complures inter se colligat"—"jura magnæ universitatis."—*Grotius, de Jure Belli et Pacis, Proleg.* 17, 23.

"Sociétés, qui forment les nations—membres principaux de ce grand corps qui renferme tous les hommes."—*D'Aguessseau*, l. 444; *Institution du Droit public*, v., vi.

"Comme donc le genre humaine compose une société universelle divisée en diverses nations, qui ont leurs gouverneurs séparés," &c.—*Domat, Traité des Loix*, ch. 11, s. 39.

(*b*) *Dig. lib. v. tit. i. 76*: "(De inoff. testamento) *populum eundem hoc tempore putari, qui abhinc centum annis fuisset, cum ex illis nemo nunc viveret.*"

*Dig. lib. vii. tit. i. 56*: "(De usufructu) an usufructûs nomine actio *municipibus* dari debeat, quæsitum est, periculum enim esse videbatur

III. States, considered in their corporate character, are not improperly said to have internal and external relations (c).

IV. The internal relations of States are those which subsist between governments and their subjects in all matters relating to the public order of the State: the laws and principles which govern these internal relations form the subject of public jurisprudence, and the science of the publicist—*jus gentis publicum* (d).

V. The internal relations of a State may, generally speaking, be varied or modified without the consent of other States—*aliis inconsultis* (e).

ne perpetuus fieret quin neque morte nec facile capitis diminutione periturus est . . . sed tamen placuit dandum esse actionem: unde sequens dubitatio est quousque tuendi sunt municipes? et placuit centum annis tuendos esse municipes, *quia is finis vite longævi hominis est.*"

The expression *municipes* is identical with *municipium*.—*Savigny, R. R.* ii. 249.

*Dig. lib. xvi. tit. i. 22*: "(De fidejuss.) hæreditas personæ vice fungitur sicuti *municipium*, et curia, et societas."

*Dig. lib. iii. tit. 4*: "Quod cujuscunque universitatis nomine vel contra rem agatur."—*Lib. i. s. 1, 2.*

*Cod. lib. ii. t. 29*: "De jure reipublicæ: 30, de administratione rerum publicarum; 31, de vendendis rebus civitatis; 32, de debitoribus civitatum."

*Hobbes*, with his usual perspicuity: "Quia civitates semel institutæ induunt proprietates hominum personales."—*De Civ. c. 14, ss. 4, 5.*

*Puffendorf* adopted this view.—*Ib.* 3, 13.

*Wolff, Præf.*: "Enimvero cum gentes sint personæ morales ac ideo nonnisi subjecta certorum jurium et obligationum."

"Puis donc qu'une nation doit à sa manière à une autre nation ce qu'un homme doit à un autre homme," &c.—*Vattel, Droit des Gens*, liv. ii. ch. 1, s. 3; "Celle qui a tort pèche contre sa conscience."—*Ib. Prélim. s. 21.*

(c) *D'Aguesseau*, *ib.*

*Blume, Deutsches Privatrecht*, s. 19: "Der Staat . . . als ideale Person wird er zum lebendigen Träger des gesammten öffentlichen Rechts."

*Puchta, Cursus der Institutionen*, s. 25, b. 73, 4.

(d) "The Law which belongeth unto each nation—the Law that concerneth the fellowship of all."—*Hooker's Ecclesiastical Polity*, b. i. s. 10.

"Publicum jus est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem."—*Ulpian, Dig. i. t. i. s. 2, De Just. et Jure.*

(e) "Hoc autem non est jus illud gentium proprie dictum: neque enim pertinet ad mutuam inter se societatem, sed ad cujusque populi tran-

VI. But in the great community of the world, in the society of societies, States are placed in relations with each other, as individuals are with each other in the particular society to which they belong (*f*). These are the external relations of States.

VII. As it is ordained by God that the individual man should attain to the full development of his faculties through his intercourse with other men, and that so a people should be formed (*g*), so it is divinely appointed that each individual society should reach that degree of perfection of which it is capable, through its intercourse with other societies.

To move, and live, and have its being in the great community of nations, is as much the normal condition of a single nation, as to live in a social state is the normal condition of a single man.

VIII. From the nature then of States, as from the nature of individuals, certain rights and obligations towards each other necessarily spring; these are defined and governed by certain laws (*h*).

IX. These are the laws which form the bond of justice between nations, "quæ societatis humanæ vinculum continent" (*i*), and which are the subject of international juris-

quillitatem: unde et ab uno populo aliis inconsultis mutari potuit," &c.  
—*Grotius, de Jure Belli et Pacis*, lib. xi. ch. 8, s. 2.

(*f*) "Ex hoc jure gentium introducta bella, discretæ gentes, regna condita, dominia distincta."—*Dig.* lib. i. tit. i. s. 5.

*Jus Gentium*, however, here as elsewhere in the Roman Law, means Natural Law.—*Grot. de J. B. et P.* lib. ii. c. viii. tit. i. 26.

*Savigny, R. R.* b. 1, App.

*Taylor's Civil Law*, 128.

(*g*) *Puchta, Coursus der Institutionen*, i. s. 25, b. 73.

"That Law which is of commerce between grand Societies, the Law of Nations and of Nations Christian."—*Hooker*, ib.

(*h*) "Si nulla est communitas quæ sine jure conservari possit, quod memorabili latronum exemplo probabat Aristoteles; certe et illa quæ genus humanum aut populos complures inter se colliget, jure indiget."  
—*Grot. Proleg.* 23; *Vattel, Prélim.* s. 11.

(*i*) *Grot. de Jure B. et P.* l. ii. 26.

prudence, and the science of the international lawyer—*jus inter gentes* (j).

“The strength and virtue of that law (it has been well said) are such that no particular nation can lawfully prejudice the same by any their several laws and ordinances, more than a man by his private resolutions the law of the whole commonwealth or State wherein he liveth; for as civil law, being the act of the whole body politic, doth therefore overrule each several part of the same body, so there is no reason that any one commonwealth of itself should to the prejudice of another annihilate that whereupon the whole world hath agreed” (k).

X. To clothe with reality the abstract idea of justice, to secure by law within its own territories the maintenance of right against the aggression of the individual wrong-doer, is the primary object of a State, the great duty of each separate society.

To secure by law, throughout the world (l), the maintenance

(j) It is to the English civilian *Zouch* that we owe the introduction of this correct phrase, the forerunner of the terms *International Law*, now in general use.—See *Von Ompteda, Litteratur des Völkerrechts*, s. 64.

*D'Aguessseau* afterwards adopted the phrase *jus inter gentes*.—Tom. i. 444, 521; *Instit. du Droit public*, vii. 2<sup>e</sup> partie, 1.

(k) *Hooker*, *ib.*, b. 1, s. 10.

“Dicitur ergo humana lex quia proxime ab hominibus inventa et posita est. Dico autem *proxime* quia primordialiter omnis lex humana derivatur aliquo modo a lege eterna.”—*Suarez, Tractatus de Legibus et Deo legislatore*, c. 3, p. 12 (ed. Lond. 1679).

“Omnes populi qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur; nam quod quisque populus ipsi sibi jus constituit, id ipsius proprium civitatis est; vocaturque jus civile, quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur: vocaturque jus gentium, quasi quo jure omnes gentes utuntur.”—*Dig.* lib. i. tit. i. s. 2.

(l) “Dieselbe Kraft, welche das Recht hervortreibt, bildet auch den Staat, ohne welchen das Recht nur ein unvollständiges Daseyn, eine prekäre Existenz hätte, ohne den der gemeine Wille, auf dem das Recht beruht, mehr ein Wunsch als ein wirklicher kräftiger Wille seyn würde.”—*Puchta, Instit.* xi. 27.

“Dennoch ist seine erste und unabweisliche Aufgabe die Idee des

of right against the aggression of the national wrong-doer, is the primary object of the commonwealth of States, and the great duty of the society of societies. Obedience to the law is as necessary for the liberty of States as it is for the liberty of individuals. Of both it may be said with equal truth, "*legum idcirco omnes servi sumus ut liberi esse possumus*" (*m*).

XI. It has been said that States are capable of rights, and liable to obligations; but it must be remembered that they can never be the subjects of criminal law (*n*). To speak of inflicting punishment upon a State, is to mistake both the principles of criminal jurisprudence and the nature of the legal personality of a corporation. Criminal law is concerned with a *natural* person; a being of thought, feeling, and will. A *legal* person is not, strictly speaking, a being of these attributes, though, through the medium of representation and of government, the will of certain individuals is considered as the will of the corporation; but only for certain purposes. There must be individual will to found the jurisdiction of criminal law. Will by *representation* cannot found that jurisdiction. Nor is this proposition inconsistent with that which ascribes to States a capacity of civil rights, and a liability to civil obligations. This capacity and liability require for their subject only a *will* competent to acquire and possess property, and the rights belonging to it. A *legal* as well as a *natural* person has this will. The greatest corporation of all, the State, has this will in a still greater degree than the minor subordinate corporations—the creatures of its own municipal law. The attribute of this limited will is

Rechts in der sichtbaren Welt herrschend zu machen."—*Savigny, R. R.* b. 1, k. ii. s. 9, 25.

(*m*) *Cic. pro Cluentio*, 53. "Der Staat ist die Anstalt zur Beherrschung des Rechtes in einem bestimmten Volke, das höchste Rechtsinstitut dieser Nation."—*Kaltenborn, Völkerrecht*, 250.

(*n*) *Savigny, R. R.*, 2, 94–96, has some excellent remarks on the analogous subject of the capacities and liabilities of corporations in a State.

See *Pinheiro Ferreira's Commentaries on Vattel*, wherever the word "*punir*" occurs.

consistent with the idea and object of a legal person. But the attribute of the unlimited will, requisite for the commission of a *crime*, is wholly inconsistent with this idea and object.

The mistake respecting the liability of nations to *punishment*, which appears in Grotius and Vattel, arises from two causes: First, from an indistinct and inaccurate conception of the true character of a State; secondly, from confounding the individual rulers or ministers with that of the nation which they govern or represent. The error may be fairly illustrated by an analogy drawn from municipal law. Lunatics and minors, like corporations, have no *natural* capacity of acting; an *artificial* capacity is therefore vested in their representatives, their guardians or curators. The lunatics and minors are rendered, by the acts of these representatives, capable of *civil* rights, and liable to *civil* obligations; but the possibility of their being rendered liable to *punishment* for the vicarious commission of *crime*, is a proposition as yet unknown to any human code of municipal law. Justice and law lay down the rule: "*Ut noxa tantum caput sequatur*" (o). It does not impugn this doctrine, to maintain that a State may be injured and insulted by another; may seek redress by war, or may require the deposition of the ruler, or the exile of the representative of another State; or may deprive a State of its territory wholly or in part. These measures may be necessary to preserve its own personality and existence, the welfare of other States, and the peace of the world, and on these grounds, but upon no other, they may be defensible. These acts, when lawful, are acts, directly or indirectly, of

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(o) It is hardly necessary to say, that the awful question of God's dealing with sinful nations does not enter into this discussion.

"Nunquam curiæ a provinciarum rectoribus generali condemnatione mulcentur, cum utique hoc et æquitas suadeat et regula juris antiqui, ut *noxa tantum caput sequatur*, ne propter unius fortasse delictum alii dispendiis affligantur."—*Nov. Majoriani*, tit. 7; *Hugo, Jus Civile Antequat.* p. 1386, s. 4; cited *Savigny, R. R.* 2, 321.

self-defence, not of punishment. It has happened, that corporations have been subjected to calamities which at first sight resemble punishments (*p*). Municipalities have been deprived of their legal personality, or have been stripped of their honours and privileges, as regiments have been deprived of their colours. But these acts, duly considered, are acts of policy, not of justice (*q*).

We read in Roman history of the *punishment* inflicted upon the city of Capua, which had revolted from Rome, and become the ally of Hannibal. Reconquered Capua was stained with the blood of her eminent citizens, and disfranchised of all her corporate privileges (*r*). But this, and other less remarkable instances of the like kind in Roman history, did not purport to be, and were not judicial applications of criminal law; but were rather acts of state policy, intended to strike terror equally into foes and subjects (*s*).

A very different principle appears in the pages of Roman jurisprudence, in which the obligation arising from the commission of a crime—*obligatio ex delicto*—is distinguished from the obligation arising from the possession of a benefit obtained by the commission of a crime—*obligatio ex re, ex eo quod ad aliquem pervenit* (*t*). The latter, but not the former obligation, may bind a corporate body.

Under what circumstances States become responsible for the guilty acts of their individual members (*u*) will be con-

(*p*) *Savigny, R. R.* 2, 318.

(*q*) *Livy*, lib. xxvi. c. 15: "De supplicio Campani," &c.

C. 17: "Quod ad supplicium, ad expetendas pœnas," &c.

(*r*) C. 16: "Cæterum habitari tantum, tanquam urbem, Capuam, frequentarique placuit: corpus nullum civitatis, nec senatus, nec plebis concilium, nec magistratus esse; sine consilio publico, sine Imperio, multitudinem, nullius rei inter se sociam, ad consensum inhabilem fore."

(*s*) C. 16: "Confessio expressa hosti quanta vis in Romanis ad expetendas pœnas ab infidelibus sociis, et quam nihil in Annibale auxilii ad receptos in fidem tuendos esset."

(*t*) *Dig.* xliii. t. xvi. s. 4: "De vi.—Si vi me dejecerit quis nomine municipum in municipes mihi interdictum reddendum Pomponius ait, si quid ad eos pervenit."

(*u*) "Solere pœnæ expetendæ causa bella suscipi, et supra ostendimus



sidered hereafter. But even in these cases the State is not punishable, though liable to make compensation for the injury which it has sanctioned.

XII. Vattel describes with simplicity and truth the province of International Jurisprudence: "*Le droit des Gens*" (he says) "*est la science du droit qui a lieu entre les Nations et les Etats, et des obligations qui répondent à ce droit*" (x).

The same favourite expounder of International Law does not hesitate to class among these *obligations* binding upon the national conscience, the duty of succouring another nation unjustly invaded and oppressed. The fact that no defensive alliance formally subsists between the two nations cannot, he says, be alleged as an excuse for the neglect of this duty (y). The nation that renders the succour, is keeping alive that benevolent spirit of mutual assistance, the appli-

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et passim docent historiæ: ac plerumque hæc causa cum altera de damno reparando conjuncta est, quando idem actus et vitiosus fuit et damnum reipsa intulit, ex quibus duabus qualitatibus duæ diversæ nascuntur obligationes."—*Grotius*, lib. ii. c. 20, s. 28.

"Sciendum quoque est, reges, et qui par regibus jus obtinent, jus habere *pœnas* poscendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quæ ipsos peculiariter non tangunt, sed in quibusvis personis jus naturæ aut gentium immaniter violentibus."—*Ib.* lib. ii. c. 20, s. 40.

"Et eatenus sententiam sequimur Innocentii, et aliorum qui bello agunt, peti posse eos qui in naturam delinquant: contra quam sentiunt Victoria, Vasquius, Azorius, Molina, alii, qui ad justitiam belli requirere videntur, ut qui suscipit aut læsus sit, in se aut republica sua, aut ut in eum qui bello impetitur jurisdictionem habeat. Ponunt enim illi *puniendi* potestatem esse effectum proprium jurisdictionis civilis, cum nos eam sentiamus venire etiam ac jure naturali, qua de re aliquid diximus libri primi initio. Et sane si illorum a quibus dissentimus admittatur sententia, jam hostis in hostem *puniendi* jus non habebit, etiam post juste susceptum bellum ex causa non *punitiva*: quod tamen jus plerique concedunt, et usus omnium gentium confirmat, non tantum postquam debellatum est, sed et manente bello; non ex ulla jurisdictione civili, sed ex illo jure naturali quod et ante institutas civitates fuit, et nunc etiam viget, quibus in locis homines vivunt, in familias non in civitates distributi."—*Ib.* lib. ii. c. 20, s. 40 (4).

C. 21: "De communicatione *pœnarum*."

(x) *Prélim.* s. 3.

(y) *Ib.* l. 2. c. xxv. ss. 1-7.

cation of which she herself may one day need. To perform her duty to another is, in truth, to strengthen the foundations of her own security; and in the case of the nation, as in the case of the individual, duty and true self-love point to the same path (z).

The whole edifice of this science, pronounced by the still higher authority of Grotius to be the noblest part of jurisprudence (a), may be said to rest upon the sure foundations—first, of moral truth; and, secondly, of historical fact:—

1. The former demonstrates that independent communities are free moral agents.

2. The latter, that they are mutually recognized as such in the universal community of which they are individual members (b).

(z) "Ainsi quand un État voisin est injustement attaqué par un ennemi puissant, qui menace de l'opprimer, si vous pouvez le défendre sans vous exposer à un grand danger, il n'est pas douteux que vous ne deviez le faire. N'objectez point qu'il n'est pas permis à un souverain d'exposer la vie de ses soldats pour le salut d'un étranger, avec qui il n'aura contracté aucune alliance défensive. Il peut lui-même se trouver dans le cas d'avoir besoin de secours; et par conséquent mettre en vigueur cet esprit d'assistance mutuelle, c'est travailler au salut de sa propre nation."—Liv. ii. c. i. s. 4.

(a) Grotius, *Proleg.* 32: "In hoc opere quod partem jurisprudentiæ longe nobilissimam continet."

Aristoteles, *Eth.* lib. i. c. 2: 'Αγαπητὸν μὲν καὶ ἐνὶ μόνῳ καλλίον δὲ καὶ θεώτερον ἔθνει καὶ πόλεσιν.

(b) Domat, *Traité des Lois*, c. xi. s. 30.

Kaltenborn, *Kritik des Völkerrechts*, s. 295.

"Possunt autem gentium præcepta ad unum principium revocari, quo quasi fundamento suo nituntur. Oportet enim esse gentes vel republicas, quæ se invicem ut liberas et sui juris nationes agnoscunt. Hac agnitione, sine qua jus gentium ne cogitari quidem potest, efficitur, ut illæ civitates *personarum* ad instar habeantur, quæ non minus quam singuli homines caput habentes, suo jure utuntur, et mutuo juris vinculo inter se junguntur. Hujus vinculi definitio atque ponderatio juris gentium argumentum est."—*Doctrina Juris Philosophica*, &c. Warnkönig, s. 145, p. 180.

## CHAPTER II.

## PLAN OF THE WORK.

XIII. A TREATISE on International Jurisprudence appears to admit of the following general arrangement:—

1. An inquiry into the origin and nature of the *Laws* which govern international relations (*leges*).

2. The *Subjects* of these laws. The original and immediate subjects are States considered in their corporate character.

3. The *Objects* of these laws. These objects are Things, Rights, and the Obligations which correspond to them (*Res, Jura, Obligationes*).

4. *Certain Subjects* of these laws which, though only to be accounted as such mediately and derivatively, yet, for the sake of convenience, require a separate consideration.

These Subjects of International Law are the following individuals who are said to *represent* a State:—

1. *Sovereigns*.

2. *Ambassadors*.

Also another class of public officers who are not clothed, accurately speaking, with a representative character, but who are entitled to a *quasi* diplomatic position, namely—

3. •*Consuls*.

4. Lastly, the *International Status of Foreign Spiritual Powers*, especially of the *Pope*, requires a distinct consideration (a).

XIV. Public International Rights, like the Private

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(a) Treated of in vol. ii.

Rights of an Individual, are capable of being protected and enforced by Legal Means.

These Legal Means are of two kinds, aptly expressed by jurists as being (1) *via amicabili*, and (2) *via facti*.

- |                   |   |                      |
|-------------------|---|----------------------|
| 1. Via amicabili. | { | 1. Negotiation.      |
|                   |   | 2. Arbitration.      |
|                   |   | 3. Conference.       |
|                   |   | 4. Congress.         |
| 2. Via facti.     | { | 1. Reprisals.        |
|                   |   | 2. Embargo.          |
|                   |   | 3. War ( <i>b</i> ). |

When war has actually begun, we enter upon the *jus belli*, which is to be considered with reference to

1. The Rights of Belligerents;
2. The Rights of Neutrals—

“Sequitur enim de jure belli: in quo et *suscipiendo*, et “*gerendo*, et *deponendo*, jus, ut plurimum valet, et fides” (*c*).  
 “For the wars (as Lord Bacon says) are no massacres and “confusions, but they are the highest trials of right” (*d*).

Grotius points out, with his usual sound and true philosophy, the proper place, object, and functions of war in the system of International Law (*e*): “Tantum vero abest ut “admittendum sit, quod quidam fingunt, in bello omnia jura “cessare, ut nec suscipi bellum debeat nisi *ad juris consecutionem*, nec susceptum geri nisi intra juris et fidei modum. “Bene Demosthenes bellum esse in eos dixit, qui judiciis “coerceri nequeunt; judicia enim vigent adversus eos qui “invalidiores se sentiunt: *in eos qui pares se faciunt aut putant*, bella sumuntur; sed nimirum ut recta sint, non minori

(b) Treated of in vol. iii.

(c) Cicero *de Rep.* lib. ii. c. 14; and he adds, “horumque ut publici interpretes essent lege sauximus.”

(d) Bacon's *Works*, vol. v. p. 384 (ed. Basil Montagu).

(e) Grotii *Proleg.* 25, *de Jure Belli et Pacis*; though he illogically displaces the treatment of it in his great work, beginning, as indeed he admits, with the end of his subject.

“*religione exercenda quam judicia exerceri solent* ;” and again, “*bellum pacis causa suscipitur*” (f).

XV. When by use of the Legal Means of War the Right has been obtained or secured, or the Injury redressed—*post juris consecutionem*—the normal state of peace is re-established.

A consideration of the negotiations which precede, and the consequences which follow, the Ratification of Peace will conclude that portion of this work which relates to Public International Law.

XVI. We have hitherto spoken of Public International Law (*jus publicum inter gentes—jus pacis*), which governs the mutual relations of States with respect to their Public Rights and Duties; but, as States are composed of Individuals, and as individuals are impelled by nature and allowed by usage to visit and to dwell in States in which they were not born, and to which they do not owe a natural allegiance, and as they must and do enter into transactions and contract obligations, civil, moral, and religious, with the inhabitants of other States, and as States must take some cognizance of these transactions and obligations, and as the municipal law of the country cannot, in many instances at least, be applied with justice to the relations subsisting between the native and the foreigner—from these causes a system of Private International Law, a “*jus gentium privatum*,” has sprung up, which has taken deep root among Christian, though it more or less exists among all, nations.

The distinction, however, between the two branches of International Jurisprudence is extremely important. It is this:—

The *obligationes juris privati inter gentes* are not—as the

(f) *Grotius, de J. B. et P. lib. i. c. i. s. 1.*

“Le mal que nous faisons à l'agresseur n'est point notre but: nous agissons en vue de notre salut, nous usons de notre droit; et l'agresseur est seul coupable du mal qu'il s'attire.”—*Vattel*, liv. ii. c. ii. s. 18.

*Taylor's Civil Law*, p. 131.

*obligationes juris publici inter gentes* are—the result of legal necessity, but of social convenience, and they are called by the name of Comity—*comitas gentium*.

It is within the absolute competence of a State to refuse permission to foreigners to enter into transactions with its subjects, or to allow them to do so, being forewarned that the municipal law of the land will be applied to them (*g*); therefore a breach of comity cannot, strictly speaking, furnish a *casus belli*, or justify a recourse to war, any more than a discourtesy or breach of a natural duty, simply as such, can furnish ground for the private action of one individual against another (*h*).

For a want of Comity towards the individual subjects of a foreign State, reciprocity of treatment by the State whose subject has been injured, is, after remonstrance has been exhausted, the only legitimate remedy; whereas the breach of a rule of Public International Law constitutes a *casus belli*, and justifies in the last resort a recourse to war.

It is proposed to treat the subject of Comity or Private International Law next in order to the subject of Public International Law.

(*g*) *Neyron, Principes du Droit des Gens européens*, l. clxxi. c. vi. s. 177.

*Barbeyrac, Ad Grotium*, l. ii. c. ii. s. 13.

(*h*) *Vattel*, liv. ii. c. i. s. 10.

## CHAPTER III.

## SOURCES OF INTERNATIONAL LAW.

XVII. It is proposed in this chapter to trace the source and ascertain the character of those laws which govern the mutual relations of independent States in their intercourse with each other.

XVIII. International Law has been said, by one profoundly conversant with this branch of jurisprudence, to be made up of a good deal of complex reasoning, and, though derived from very simple principles, altogether to comprise a very artificial system (*a*).

XIX. What are the depositories of this reasoning and these principles? What are the authorities to which reference must be made for the adjustment of disputes arising upon their construction, or their application to particular instances? What are in fact the fountains of International Jurisprudence—"dijudicationum fontes?"—to borrow the just expression of Grotius. These are questions which meet us on the threshold of this science, and which require as precise and definite an answer as the peculiar nature of the subject will permit (*b*).

XX. Grotius enumerates these sources as being "*ipsa natura, leges divinæ, mores, et pacta*" (*c*).

(*a*) Lord Stowell, *The Hurtig Hane*, 3 C. Rob. Adm. Rep. 326.

(*b*) Arist. *Eth.* lib. i. c. 3; Παιδευμένον γὰρ ἐστίν, ἐπὶ τοσούτων τὰκρίβεις ἐπιζητεῖν καθ' ἕκαστον γένος, ἐφ' ὅσον ἡ τοῦ πράγματος φύσις ἐπιδέχεται· παραπλήσιον γὰρ φαίνεται, μαθηματικῷ τε πιθανολογούντος ἀποδέχασθαι, καὶ ῥητορικὸν ἀποδείξεως ἀπαιτεῖν.

(*c*) *Prolegom.*: "By the Law of Nature and Nations and by the Law Divine, which is the perfection of the other two."—Lord Bacon, *Of an Holy War*.

In 1753, the British Government made an answer to a memorial of the Prussian Government (*d*) which was termed by Montesquieu *réponse sans réplique* (*e*), and which has been generally recognized as one of the ablest expositions of international law ever embodied in a state paper. In this memorable document, "The Law of Nations" is said to be "founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage."

XXI. These two statements may be said to embrace the substance of all that can be said on this subject. An attempt must now be made to examine in detail, though not precisely in the same order, each of the individual sources set forth in the foregoing citations.

XXII. Moral persons are governed partly by Divine Law (*leges divinæ*), which includes natural law—partly, by positive instituted human law, which includes written and unwritten law or custom (*jus scriptum, non scriptum, consuetudo*).

States, it has been said, are reciprocally recognized as moral persons. States are therefore governed, in their mutual relations, partly by Divine, and partly by positive law. Divine Law is either (1) that which is written by the finger of God on the heart of man, when it is called Natural Law; or (2) that which has been miraculously made known to him, when it is called revealed, or Christian law (*f*).

XXIII. The Primary Source, then, of International Jurisprudence is Divine Law. Of the two branches of Divine Law which have been mentioned, natural law, called by jurists *jus primarium*, is to be first considered. "In jure gentium" (*g*), Grotius says, "*jus naturæ includitur*;" and, again, "*jure primo gentium quod et naturale dicitur*."

All civilized heathen nations have recognized this law as

(*d*) *Cabinet of Scarce and Celebrated Tracts*, 1 vol. (Edinburgh).

(*e*) *Lettres persanes*, liv. xlv.

(*f*) *Arist. Eth.* lib. v. c. 7. St. Paul's Ep. to the Romans, ii. 14, 15.

(*g*) *Mare Liberum*, lib. v.; *Merlin, Rep. de Jurispr.* tom. v. p. 291.

"Hanc autem questionem ad *jus Naturæ* ideo retulimus, quia ex historiis



binding upon themselves in their *internal* relations. They called it the unwritten, the innate law—the law of which mortals had a Divine intuition (*h*)—the law which was begotten and had its footsteps in heaven, which could not be altered by human will (*i*), which secured the sanctity of all obligations—the law which natural reason has rendered binding upon all mankind (*h*).

XXIV. It has been often said that the civilized heathen nations of old, the Greeks and Romans, recognized no such law in their *external* relations; that is, in their intercourse with themselves or with other nations. But this conclusion is founded on slender and insufficient premises, chiefly upon the absence of distinct treatises on the subject, on the want of a distinct phrase expressing the modern term international law—on the etymological meaning of words—on the use of "*jus gentium*" in the repositories of Roman law, as an expression identical with *jus naturæ*—and on the practical contempt for the law, exhibited in the unbounded ambition and unjustifiable conquests of ancient Rome.

XXV. Nevertheless, we know that Aristotle passed a severe censure upon those nations who would confine the cultivation of justice within the limits of their own territories and neglect the exercise of it in their intercourse with other nations (*l*). Thucydides (*m*) prefers the same charge against

nihil comperire potuimus ea de re jure voluntario gentium esse constitutum."—*Grot.* 1. iii. v. 5.

(*h*) *Arist. Rhet.* b. i. c. 13: "Ἴδιον μὲν τὸν ἐκάστοις ὁρισμένον πρὸς αὐτοὺς· καὶ τούτων τὸν μὲν ἄγραφον, τὸν δὲ γεγραμμένον. Κοινὸν δὲ τὸν κατὰ φύσιν· ἔστι γὰρ, ὃ μαντεύονται τι πάντες, φύσει κοινὸν δίκαιον καὶ ἄδικον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ἢ, μηδὲ συνθήκη.

(*i*) *Soph. Antig.* v. 450–7; ὑψίποδες νόμοι, *Œd. Tyr.* 886.

(*k*) *Cic. Pro Milone*, 3; *De Rep.* 1. iii. c. 22.

(*l*) Αὐτοὶ μὲν γὰρ παρ' αὐτοῖς τὸ δίκαιως ἔρκειν ζητοῦσι, πρὸς δὲ τοὺς ἄλλους οὐδὲν μέλει τῶν δικαίων.—*Polít.* lib. vii. c. 2. And when he is discussing the different *ends* of different kinds of oratory, and observing that the speaker in the public assembly dwells on the inexpediency and not the immorality of a particular course of action: ὥς δ' οὐκ ἄδικον τοὺς ἀστυγείτονας καταδουλοῦσθαι, καὶ τοὺς μηδὲν ἄδικούντας, πολλάκις οὐδὲν φροντίζουσιν.—*Rhet.* tom. i. c. 3.

(*m*) *Hist.* lib. v.

the Lacedæmonians, which is repeated by Plutarch (n); and we find Plato demanding (o), with indignation, whether it was reasonable to suppose that any society could flourish which did not respect the rights of other societies. We find Euripides speaking of the natural equality of rights as binding city to city, and ally to ally (p). We find Themistocles claiming the right, "*communi jure gentium*," of placing Athens in a state of defence (q). We find that the rights of embassy were respected—that treaties were ratified by solemn sacrifices (r), and placed under the especial care of the deities, who avenged violated faith. We read of the memorable Amphictyonic league, which constituted the tribunal of public international law for the different States of Greece. These and other historical facts demonstrate that the application of the principles of natural justice to international relations, however imperfectly executed, and though never reduced to a system, was not unknown to Greece.

XXVI. We are led with yet more certainty to this conclusion with respect to Rome, by the consideration of two remarkable institutions which existed there:—1. The *Collegium Fecialium*, with the *Jus Feciale* (s), which could not be better translated than by the words "Public International

(n) *Plutarch, Vita Agesilai.*

(o) Πόλιν φαίης ἂν ἄδικον εἶναι καὶ ἄλλας πόλεις ἐπιχειρεῖν δουλοῦσθαι ἀδίκως καὶ καταδεδουλῶσθαι, πολλὰς δὲ καὶ ὑφ' αὐτῇ ἔχειν δουλωσαμένην; Πῶς γὰρ οὐκ; ἔφη . . . ἀλλὰ δὴ καὶ τόδε μοι χάρισαι καὶ λέγε· δοκεῖς ἂν ἢ πόλιν, ἢ στρατόπεδον, ἢ ληστὰς, ἢ κλέπτας, ἢ ἄλλο τι ἔθνος, ὃ σα κοινῇ ἐπὶ τι ἔρχεται ἀδίκως, πράξαι ἂν τι δύνασθαι εἰ ἀδικοῖεν ἀλλήλους; Οὐ δῆτα, ἢ δ' ὅς. Τί δ' εἰ μὴ ἀδικοῖεν; οὐ μᾶλλον; Πάνυ γε, κ.τ.λ.—*De Rep. lib. i. 22-3.*

(p)

Κεῖνο κάλλιον, τέκνον,

ἰσότητα τιμῶν, ἢ φίλους ἀεὶ φίλοις

πόλεις τε πόλεσι συμμαχοῦς τε συμμαχοῖς.

Ξυνδεῖ, τὸ γὰρ ἴσον νόμιμον ἀνθρώποις ἔφν.

*Phænissæ, 535.*

(q) *Cornelius Nepos, Vita Themistoc.*

(r) *Livy, l. xxiv.*

(s) Zouch's Treatise on International Law is entitled "*De Jure Feciali, sive de Jure inter Gentes.*"

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"Law." 2. The institution of the *Recuperatores*, with the doctrine of the *Recuperatio*, the precursor of that system which is now called "Private International Law." Traces of the same fact are abundantly scattered over the pages of Latin authors, legal, historical, and philosophical. The phrase "*jus gentium*," in classical writers, and in the Justinian compilations of law, is indeed generally (though not without exceptions) used as synonymous with natural law<sup>(t)</sup>; for there are passages in these compilations, as well as in the pages of Sallust and Livy, in which the phrase, strictly speaking, denotes international law. The fact, moreover, that the expression "*jus gentium*" was used as synonymous with what is now called "*jus naturale*" is by no means inconsistent with the position, that the principles of natural law were, theoretically at least, recognized by Rome in her external as well as her internal relations<sup>(u)</sup>.

A cursory reference to the works of Cicero alone will show that in his time, and before the destruction of the Republic, the science of international law was beginning to receive great cultivation in all its branches; nor can the necessity and duty of international obligations be more forcibly inculcated than in these works: "*Qui civium rationem habendam dicunt, exterorum negant, hi communionem et societatem humani generis dirimunt.*"

Cicero praises Pompey for being well versed, not only in what is now called Conventional or Diplomatic Law, but also in the whole jurisprudence relating to Peace and War.

Cicero maintains, that God has given to all men conscience and intellect; that where these exist, a law exists, of which all men are common subjects. Where there is a common law,

(t) *Puchta, Instit.* 392. See Appendix.

(u) *Taylor*, p. 128. "The law was natural law before: the existence of this situation only gives its use and application. Suppose the observance of faith to be a rule of nature: when, to speak in the language of the Schools, it is *Jus Naturæ ab origine et causa proxima*, it is *Jus Gentium a subjecto*." And again: "Contracts were introduced by the law of nations; no new law is formed, but an eternal and necessary law has now a scene to exert its operations in."

he argues, there is a *common right*, binding more closely and visibly upon the members of each separate State, but so knitting together the Universe, “*ut jam universus hic mundus una civitas sit, communis Deorum atque hominum existimanda*” (x).

That law, this great Jurist says, is immortal and unalterable by prince or people, and in glowing language he anticipates the time when one law and one God will govern the world: “*Neque erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium Deus*” (y).

XXVII. The subject which has been just discussed is not one of mere literary curiosity or philosophical research. It has indirectly a practical bearing on the theme of this

(x) *De Rep.* The Epistles of Seneca, the contemporary of St. Paul, breathe the very spirit of Christian brotherhood and unity: “*Philosophia docuit colere divina, humana diligere, et penes Deos imperium esse, inter homines consortium*” (Ep. 95). “*Homo, sacra res homini—omne hoc quod vides, quo divina atque humana conclusa sunt, unum est: membra sumus corporis magni, natura nos cognatos edidit, quum ex iisdem et in eadem gigneret. Hæc nobis amorem dedit mutuum et sociabiles fecit*” (Ep. 90).

*Trop long, de l'Influence du Christianisme sur le Droit civil des Romains*—p. 70, &c.

“*Homo sum: humani nihil a me alienum puto,*” is the language which Terence puts into the mouth of one of his characters.—*Heautontimor.* act i. sc. i. 25.

(y) *De Rep.* lib. iii. c. xxii. See also *De Legibus* (lib. i. c. vii.), and a noble passage (lib. i. c. xxiii.), where he bids his hearer elevate his mind to the prospect of the universe, its rules, and its laws: “*Seseque non unius circumdatum moenibus loci, sed civem totius mundi quasi unius urbis agnoverit.*”

“Of Law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and earth do her homage—the very least as feeling her care, and the greatest as not exempted from her power; both angels and men, and creatures of what condition soever, though each in different sort and manner, yet all, with uniform consent, admiring her as the mother of their peace and joy.”—*Hooker, ib.* b. i.

treatise. The same school which denies that the polished nations of antiquity recognized international obligations, uses the assumed fact as an illustration of a further and more general position—namely, a denial that any general International Law, not the result of positive compact, exists between Christian nations and those which are not Christian.

XXVIII. This position, it will be seen, directly conflicts with the principle just enunciated; and, on the contrary, the first important consequence which flows from the influence of Natural upon International Law is, that the latter is not confined in its application to the intercourse of Christian nations, still less, as it has been affirmed, of European nations, but that it subsists between Christian and Heathen, and even between two Heathen nations, though in a vaguer manner and less perfect condition than between two Christian communities; so that whenever communities come into contact with each other, before usage or custom has ripened into a quasi contract, and before positive compacts have sprung up between them, their intercourse is subject to a Law (z).

Lord Stowell, in one of those judgments in the British High Court of Admiralty which contain a masterly exposition of the principles of International Jurisprudence, speaking of the then Mahometan States in Africa, observed, "It is by the law of treaty only that these nations hold

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(z) So *Mr. Jenkinson* (afterwards Earl of Liverpool), in his able treatise "On the Conduct of the Government of Great Britain in 1758," observes (p. 29)—"I shall therefore examine the right which neutral powers claim in this respect, first, according to the law of nations—that is, according to those principles of natural law which are applicable to the conduct of nations, such as are approved by the ablest writers and practised by States the most refined. I shall then consider the alterations which have been made in this right by those treaties which have been superadded to the law of nations, and which communities, for their mutual benefit, have established among themselves."

"*Jus hoc (i.e. legationis) non ut jus naturale ex certis rationibus certum pritur, sed ex voluntate gentium modum accipit.*" Here the distinction between natural and conventional international law is clearly laid down, —*Grot. lib. ii. c. xviii. 4, 2.*

“themselves bound, conceiving (as some other people have foolishly imagined) that there is no other law of nations, but that which is derived from positive compact and convention” (a). The true principle is clearly stated in the manifesto of Great Britain to Russia, in 1780: “His Majesty,” it is said in that State paper, “has acted towards friendly and mutual powers according to their own procedure respecting Great Britain, and conformable to the clearest principles generally acknowledged as the Law of Nations, being the only law between powers where no treaties subsist, and agreeable to the tenor of his different engagements with others; these engagements have altered *this primitive law* by mutual stipulations proportioned to the will and convenience of the contracting parties” (b).

Montesquieu was not ignorant, as has been supposed, of the science of International Law when he said, “Toutes les nations ont un droit des gens; et les Iroquois mêmes qui mangent leurs prisonniers en ont un. Ils envoient et reçoivent des ambassades; ils connoissent des droits de la guerre et de la paix: le mal est que ce droit des gens n’est pas fondé sur les vrais principes” (c). In other words, these barbarous nations acknowledged, even while polluted by such abominations, that certain rules were to be reciprocally observed in their intercourse with each other, whether in Peace or War—even as the savages who practise infanticide do homage to the Moral Law in holding ingratitude to be infamous.

In the same spirit an eminent writer on English Criminal Law (d), speaking of the immunities of Ambassadors, says: “But for murder and other offences of great enormity, which

(a) *The Helena*, 4 C. Rob. Adm. Rep. p. 7.

(b) *Ann. Regis.* vol. xxiii. p. 348, Manifesto of England to Russia, April 23rd, 1780.

(c) *Montesquieu, de l'Esprit des Loix*, lib. i. c. iii.

(d) *Foster on Crown Law*, p. 188; *Ward's Law of Nations*, vol. ii. p. 542. The correctness of the application of this principle to the case of ambassadors will be considered hereafter.

“are against the *light of nature* and the fundamental laws of  
 “all society, the persons mentioned in this section are  
 “certainly liable to answer in the ordinary course of justice,  
 “as other persons offending in the like manner are. For  
 “though they may be thought not to owe allegiance to the  
 “Sovereign, and so to be incapable of committing high  
 “treason, yet they are to be considered as members of  
 “society, and consequently bound by that eternal universal  
 “law by which all civil societies are united and kept  
 “together” (e). Vattel says: “Les nations étant libres,  
 “indépendantes, égales, et chacune devant juger en sa *con-*  
 “*science* de ce qu’elle a à faire pour remplir ces *devoirs*, etc.,  
 “celle qui a tort pêche contre sa *conscience*” (f).

XXIX. But if the precepts of Natural Law are obligatory upon Heathen States in their intercourse with each other, much more are they binding upon Christian Governments in their intercourse with Heathen States.

Infidel Nations indeed are, it has been frequently holden, entitled, in the absence of any compact, to an indulgent application of rules derived exclusively from the positive law and established custom of Christian States (g), though

(e) See, in the *Annual Register* for 1840, vol. lxxxii. p. 429, the Chinese Commissioner's letter to the Queen of England, in which he recognizes “the principles of eternal justice” as binding between nations.

(f) *Vattel, Prélim. s. 21.*

(g) Lord Stowell speaks of the Ottoman Porte as a State long connected with this country by ancient treaties, and at the present day (i.e. in 1802) by engagements of a peculiar nature. “But,” he adds, “independently of such engagements, it is well known that this Court is in the habit of showing something of a peculiar indulgence to persons of that part of the world. The inhabitants of those countries are not possessors of exactly the same Law of Nations with ourselves. In consideration of the peculiarities of their situation and character, the Court has repeatedly expressed a disposition not to hold them bound to the utmost rigour of that system of public laws on which European States have so long acted in their intercourse with one another.”—*The Madonna del Burso*, 4 C. Rob. Adm. Rep. p. 172.

And again he says: “It has been argued that it would be extremely hard on persons residing in the Kingdom of Morocco, if they should be held bound by all the rules of the Law of Nations as it is practised

the application of rules even from these sources becomes more stringent as the intercourse increases between the Christian and the Infidel community.

The great point, however, to be established is, that the *principles* of international justice do govern, or *ought* to govern, the dealings of the Christian with the Infidel Community. They are binding, for instance, upon Great Britain, in her intercourse with the native powers of India; upon France, with those of Africa; upon Russia, in her relations with Persia or America; upon the United States of North America, in their intercourse with the Native Indians (*h*).

The violation of these principles is indeed sometimes urged in support of an opposite opinion, but to no purpose; for it is clear that the occasional vicious practice cannot affect the reality of the permanent duty.

XXX. Unquestionably, however, the obligations of International Law attach with greater precision, distinctness, and accuracy to Christian States in their commerce with each other (*i*). The common profession of Christianity both

among European States. On many accounts, undoubtedly, they are not to be so strictly considered on the same footing as European merchants: they may, on some points of the Law of Nations, be entitled to a very relaxed application of the principles established by long usage between the States of Europe holding an intimate and constant intercourse with each other."—*The Hurtige Hane*, 3 *C. Rob. Adm. Rep.* p. 326.

(*h*) Hyder Ali was invited by France and England to accede to the treaty by which the *status quo ante bellum* was established in India.—*Wheaton's History of Int. Law*, p. 305.

*Heineccius*, in *Grotium Pref.* v. i. p. 14; "Quid vero si gens quedam cum *Turcis* vel *Sinensibus*," &c.

"Now, having contended, as we still contend, that the Law of Nations is the law of India as well as of Europe, because it is the law of reason and the law of nature, drawn from the pure sources of morality, of public good, and of natural equity, and recognized and digested into order by the labour of learned men, I will refer your Lordships to *Vattel*, b. i. c. xvi., where he treats of such engagements," &c.—*Burke's Works*, xv. 100 (Speech on the Impeachment of Warren Hastings); 5 *Cranch Rep.* (American), p. 1; 5 *Peter Rep.* (American), p. 1; *Kent's Commentaries*, vol. iii. p. 382; *Wheaton's Eléments du Droit International*, i. 50.

(*i*) The Canon Law, which is in some respects International Eccle-



enforces the observances (*j*) of Natural Law, and introduces, according to the language of Bartolus, a "*speciale jus gentis fidelis*" (*k*), a new and most important element into this as into all other systems of jurisprudence; Christianity imparts a form and colour of its own to those elements of public justice and morality which it finds already existing in these systems, while it binds together by close though invisible ties the different members of Christendom, not destroying indeed their individuality, but constituting a common bond of reciprocal interest in the welfare of each other, in lieu of that exclusive regard for isolated nationality, which was the chief, though certainly not the sole end proposed to itself by the Heathen State. The language of the principal treaties of Europe fully recognizes this doctrine (*l*).

siastical Law, took distinct and especial cognizance of General International Law, and valuable remarks upon it are to be found in the commentators on the *Decretum*. *Decret. Prima Pars*, dist. i. c. ix.: "Jus gentium est sedium occupatio, edificatio, munitio, bella, captivitates, servitutes, postliminia, fœdera, paces, inducie, legatorum non violandorum religio, connubia inter alienigenas prohibita (sect. 1). Hoc inde jus gentium appellatur, quia eo jure omnes fere gentes utuntur." The great Portuguese canonist, *Barbosa*, observes on this: "Si princeps velit *vel jus gentium primum, vel secundarium* intra sui imperii limites abrogare, potestate sua abuti censendus est."—*Barbos. Collect.* in c. ix. dist. i. See, too, *Reiffenstuel* and *Schmalzgruber* on the same passage in the *Decretum*.

(*j*) Clement the Fifth, in his Bull "*Pastoralis*," annulling the extraordinary semi-legal procedure by which the Emperor Henry VII. meant to deprive Robert, King of Naples, of his kingdom, stated among other reasons, that Robert had been deprived of a natural right—viz., the means and opportunity of defending himself: "Per quæ de crimine præsertim sic quasi deleta defensionis (*quæ a jure procedit naturalis*) facultas adimi valuisse;" and, he adds, "*Cum illa imperatori tollere non licuerit quæ juris naturalis existent.*"—*Clement*, l. ii. t. xi.

(*k*) "Si enim jus gentium de servitute captivorum in bello justo in Ecclesia mutatum est, et inter Christianos id non servatur ex antiqua Ecclesiæ consuetudine quæ est veluti *speciale jus gentis fidelis* ut notavit Bartolus in l. hostis s. de captivis, n. 10."—*Suarez*, *ib.* c. xx. s. 8.

(*l*) *Treaty of Westphalia (Munster)*, 1648: "Au nom et à la gloire de Dieu, soit notoire à tous, etc.; eux Seigneurs Roi et Etats touchés

XXXI. This would be called by many who have of late years written on the science, *International Morality*; they would restrict the term *Law* absolutely and entirely to the treaties, the customs, and the practice of nations.

If this were a mere question as to the theoretical arrangement of the subject of International Law, it would be but of little importance; and the disputes to which the different modes of treating the science have given rise would perhaps be found, upon careful examination, to resolve themselves for the most part into disagreements of a verbal character. But it is of great practical importance to mark the subordination of the law derived from the consent of States to the law derived from God (*m*).

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de compassion *chrétienne*, etc.; au bien non-seulement des Pays-Bas, mais de *toute la chrétienté*, convians et prians les autres Princes et Potentats d'icelle de se laisser fléchir par la *Grâce Divine* à la même compassion," &c.—*Schmauss, Corpus Jur. Gent. Acad.* i. 614.

*Treaty of Paris*, 1763: "Au nom de la très-sainte et indivisible *Trinité*, Père, Fils, et Saint-Esprit, ainsi soit-il. Soit notoire à tous ceux qu'il appartiendra, etc.: Il a plu au *Tout-puissant* de répandre l'esprit d'union et de concorde sur les Princes, dont les divisions avoient porté le trouble dans les quatre parties du monde, etc. (Artic. I.) Il y aura une *Paix chrétienne* universelle et perpétuelle," &c.—*Wenckii Codex Juris Gentium*, iii. 329.

*Treaty of Utrecht*, 1713: "Quoniam visum est *Deo* optimo maximo, pro nominis sui gloria et salute universa, ad miseras desolati orbis jam suo in tempore medendas, ita regum animos dirigere ut mutuo pacis studio erga se invicem gerantur; notum sit, &c.: quod sub his *Divinis auspiciis* Seren. ac Potent. Princeps et Domina Anna, &c., &c., et S. ac P. Prin. et Dom. Ludovicus XIV., &c., totius *Christiani orbis* tranquillitati prospicientes, &c. suo proprio motu et paterna ea cura quam erga subditos suos et *Republicam Christianam* exercere amant," &c.—*Schmausa*, ii. 1312.

*Treaty of Versailles*, 1783, Art. 1: "Il y aura une *Paix chrétienne* universelle et perpétuelle tant par mer que par terre," &c.—*Recueil de Traités et de Conventions*, De *Martens et De Cussy*, i. 301.

*Treaty of Vienna*, 1815: "Au nom de la très-sainte et indivisible *Trinité*."—*De M. et C.* iii. 61.

"Deux lois suffisent pour régler *toute la république chrétienne*, mieux que toutes les lois politiques—l'amour de Dieu, et celui du prochain."—*Pascal, Pensées*, part ii. art. xvii.

(*m*) *Savigny, R. R.* i. 80; *Burke*, vol. viii. 182, *Letters on a Regicidal Peace*.

XXXII. One important practical inference from this position is, as has been shown, the necessary existence of International Obligations between Christian and Heathen States. Another practical consequence is, that the Law derived from the consent of Christian States is restricted in its operation by the Divine Law; and just as it is not morally competent to any individual State to make laws which are at variance with the law of God, whether natural or revealed, so neither is it morally competent to any assemblage of States to make treaties or adopt customs which contravene that Law.

Positive Law, whether National or International, being only declaratory (*n*), may add to, but cannot take from the prohibitions of Divine Law. “*Civilis ratio civilia quidem jura corrumpere potest, naturalia non utique*” (*o*), is the language of Roman Law; and is in harmony with the voice of International Jurisprudence, as uttered by Wolff;

*Suarez, de Legibus a Deo Legislatore*, l. ii. c. ii. s. 6, tit. “*De Lege Æterna et Naturali ac Jure Gentium.*”

*Grot. de J. B. & P.* l. ii. c. iii. s. 6.

*Voet ad Pandectas*, lib. i. t. i. s. 19. p. 11. *Vattel, Pref.* 22.

“*Quod si populorum jussis, si principum decretis, si sententiis judicum, jura constituerentur: jus esset latrocinari; jus adulterare; jus testamenta falsa supponere: si hæc suffragiis aut scitis multitudinis probarentur. Quæ si tanta potestas est stultorum sententiis atque jussis, ut eorum suffragiis rerum natura vertatur: cur non sanciant ut quæ mala perniciosæque sunt, habeantur pro bonis ac salutaribus? aut cur, quum jus ex injuria lex facere possit, bonum eadem facere non possit ex malo? Atqui nos legem bonam a mala nulla alia nisi naturæ norma dividere possumus.*”—*Cic. de Leg.* l. i. c. xvi.

(*n*) “It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society, than the position that any body of men have a right to make what laws they please, or that laws can derive any authority from their institution merely, and independent of the quality of the subject matter. All human laws are, properly speaking, only declaratory. They may alter the mode and application, but have no power over the substance of original justice.”—*Burke's Treatise on the Popery Laws.*

“That power which, to be legitimate, must be according to that immutable law in which will and reason are the same.”—*Burke's Works*, vol. v. p. 180 (*Thoughts on the French Revolution*).

(*o*) *Instit. de Legit. Aquat.* l. iii.

“Absit vero, ut existimes, jus gentium voluntarium ab earum voluntate ita proficisci, ut libera sit earum in eodem condendo voluntas, et stet pro ratione sola voluntas, nulla habita ratione juris naturalis” (p).

Upon this principle we may unhesitatingly condemn as illegal and invalid all secret articles in treaties opposed to the stipulations which are openly expressed. Upon this principle it is clear that a custom of countries to destroy and plunder foreigners shipwrecked upon their shores must always, and under all circumstances, be an outrage upon the rights of Nations. So with respect to an usage of imprisoning strangers who have innocently arrived in time of peace, under a lawful flag, into a foreign port, on the ground that they are free men of that particular colour or complexion, which disquiets the slaveholder of the country, inasmuch as his slaves, being of the same colour and complexion, are, by the presence of the free strangers, reminded of the possibility of becoming free also; so, if there existed in a country under the government of an autocrat a law or custom of imprisoning all strangers having peaceably arrived from a country under a republican form of government—any usage of this or the like kind, however inveterate, however sanctioned by Municipal Law, however accordant with national feeling, must always be a grievous violation of International Justice. Upon the same principle Grotius condemns the violation of women in time of war, as an undoubted breach of International Law among all Christian nations (q). In

(p) *Wolff, Jus Gent. Præf.*

(q) The prohibition even among heathen nations was, he observes, “Jus gentium, non omnium, sed meliorum;” but amongst Christian nations, he proclaims it as an undoubted principle: “Atque id inter Christianos observari par est, non tantum ut disciplinæ militaris partem sed et ut partem juris gentium—id est ut qui pudicitiam vi læsit, quamvis in bello, ubique poenæ sit obnoxius.”—Lib. iii. c. v. s. 2.

“Sed et Christianis in universum placuit bello inter ipos orto captos servos non fieri, ita ut vendi possunt, ad operas urgeri, et alia pati quæ servorum sunt, atque ita hoc saltem, quanquam exiguum est, perfecit reverentia Christianæ legis.”—Lib. iii. c. vii. s. 9.

the same manner and for the same reason he denies that captives can be lawfully made slaves, and either sold or condemned to the labour of slaves.

XXXIII. This branch of the subject may be well concluded by the invocation of some high authorities from the jurisprudence of all countries, in support of the foregoing opinion.

*Grotius* says emphatically: “Nimirum humana jura multa  
“constituere possunt *præter naturam, contra nihil*” (r).

*John Voet* speaks with great energy to the same effect:  
“Quod si contra rectæ rationis dictamen gentes *usu* quædam  
“introduxerint, *non* ea jus gentium recte dixeris, *sed pessimam potius morum humani generis corruptelam*” (s).

*Suarez*, who has discussed the philosophy of law in a chapter which contains the germ of most that has been written upon the subject, says: “Leges autem ad jus  
“gentium pertinentes veræ leges sunt, ut explicatum  
“manet, propinquiores sunt legi naturali quam leges  
“civiles, ideoque impossibile est esse contrarias æquitati  
“naturali” (t).

*Wolff*, speaking of his own time, says: “Omnium fere  
“animos occupavit perversa illa opinio, *quasi fons juris*  
“*gentium sit utilitas propria*: unde contingit, id potentiæ  
“coæquari. Damnamus hoc in privatis, damnamus in  
“rectore civitatis; sed *æque idem damnandum est in gen-*  
“*tibus*” (u).

*Mackintosh* nobly sums up this great argument: “The  
“duties of men, of subjects, of princes, of lawgivers, of  
“magistrates, and of *States*, are all parts of one consistent  
“system of universal morality. Between the most abstract  
“and elementary maxim of moral philosophy, and the most  
“complicated controversies of civil or public law, there  
“subsists a connection. The principle of justice, deeply

(r) *De J. B. et P.* lib. ii. c. vi. s. 6.

(s) *Comment. ad Pand. de Just. et Jure*, t. i. s. 19.

(t) Lib. ii. c. xx. s. 3: “De Lege *Æterna et Naturali ac Jure Gentium.*”

(u) *Jus Gent.* s. 163.

“rooted in the nature and interest of man, pervades the  
“whole system, and is discoverable in every part of it, even  
“to its minutest ramification in a legal formality, or in the  
“construction of an article in a treaty”(x).

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(x) *Discourse on the Law of Nature and Nations.*

## CHAPTER IV.

## REASON OF THE THING.

XXXIV. THE next question which arises in the prosecution of our inquiries into the sources of International Jurisprudence is this—How are the principles of Natural or Revealed Law to be applied to States?

Though States are properly and by a necessary metaphor treated as moral persons, and as the subjects of those rights and duties which naturally spring from the mutual relations of individuals; nevertheless it must be recollected that a State is actually a different thing from an individual person. Reason, therefore, which governs the application of common principles to diverse subjects, and demands, therefore, a different application of principles intrinsically the same (*a*) to the State and to the Individual, may be regarded as a distinct source of International Law.

This application must be made justly, and in a manner (*b*) suitable to this actual difference; and in order to effect this, “the reason of the thing,” which has been already enumerated as one of the sources of International Law—“*necessitas finis quæ jus facit in moralibus*” (*c*)—must in all cases be considered.

Vattel, following and improving upon Wolff, expresses himself upon this point with his usual clearness, and more than his usual force (*d*). There are many cases, he observes,

(*a*) Vattel, *Préface*, pp. 22, 23.

(*b*) Κατὰ τὴν ὑποκειμένην ὕλην.—*Arist. Eth. lib. i. c. 3*; Wolff, *Jus Gentium, Pref.*

(*c*) *Grot. de J. B. et P. l. ii. c. v. 24, s. 2.*

(*d*) Vattel, *ib. et Prélim. s. 6.*

in which Natural Law cannot decide between nation and nation as it would between individual and individual. It is necessary to learn the mode of applying the law in a manner agreeable to the subject; and it is the art of doing this according to justice, founded on *right reason*, which makes International Law a particular science. It must, as Grotius says (*e*), be “*recta illatio ex naturæ principiiis procedens*” which guides the national conscience in its international duties.

XXXV. The most strenuous—it might be said the most vehement—advocate for this source of International Jurisprudence is Bynkershoek. There is no dissertation of his upon any subject of International Jurisprudence which does not teem with references to it. “*Ratio*” and “*Usus*” are, according to him, the two props which sustain the whole building; and “*Recta ratio*” is “*Juris gentium magistra*.”

The tendency of this author, who ranks in the first class of jurists, is rather perhaps to undervalue the authority both of his predecessors and of the tribunals of his own country. His opinion on this matter, however, construed by reference to the context, and subject to the qualification which it must receive from his frequent reliance upon precedents, and upon the opinions both of jurists and civilians, contains in reality nothing objectionable or inconsistent with the doctrine of other writers (*f*) with respect to the international authority due to these precedents and these opinions.

Bynkershoek was very far from meaning to convey the notion that whenever a question arose between nations, either of the contending parties was at liberty to solve it arbitrarily, according to its own notions of convenience or by an independent process of reasoning. On the contrary, in every case of doubt, the reason which long usage had sanctioned was to prevail; and the authorities of writers and of precedents were also recognised as leading to a

(*e*) *Ptoley*, s. 40.

(*f*) *Vattel*, *Prélim.* s. 6.



just conclusion of Law. But he more especially recognized the fitness of one authority to direct and guide the *Reason* of States in the adjustment of their mutual relations; that authority was the *written reason* of the Roman Law.

His predecessors indeed, in every page of their writings, had assumed as unquestionable the homage due to this collection of the maxims deducible from right reason and natural justice. None, however, have spoken more strongly with respect to it than Bynkershoek: "*Non quod in iis*," he says, "*quæ sola ratio commendat a jure Romano ad jus gentium non tuta sit collectio*" (g).

And again: "*Quamvis non de populi Romani, sed de gentium jurisprudentia agamus, non abs re tamen erit de jure Romano quædam præmonuisse, cum qui id audit vocem fere omnium gentium videatur audire*" (h).

Again: "*Abstine commodò si damnum metuis, ipsa juris gentium, non sola Ulpiani vox est*" (i).

XXXVI. The Roman Law may in truth be said to be the most valuable of all aids to a correct and full knowledge of international jurisprudence, of which it is indeed, historically speaking, the actual basis; and it has been remarked with equal force and elegance by an English civilian, "that although whatever we read of in the text of the *Civil Law* was not intended by the *Roman* legislators to reach or direct beyond the bounds of the *Roman* empire, neither could they prescribe any law to other nations which were in no subjection to them. . . . Yet since (j) there is such a strong stream of natural reason continually flowing in the channel of the Roman Laws, and that there is no affair or business known to any part of the world now which the Roman empire dealt not in before, and their

(g) *Quæstiones Juris Publici*, l. i. c. iii.

(h) *De Foro Legat.* c. vi.

(i) *Quæst. J. P.* c. viii. in fine. The passage cited from *Ulpian* will be found *Dig. lib. xvii. t. ii. s. 23.*—*Pro socio*—"abstine commodò quod per servum accessit, si damnum petis."

(j) *Albericus Gentilis*, l. i.; *de Jure Belli*, c. i.

“justice still provided (*k*) for; what should hinder but that, “the nature of affairs being the same, the same general rule “of justice, and dictates of reason, may be as fitly accom- “modated to foreigners dealing with one another (as it is “clear they have been by the civilians of all ages), as to “those of one and the same nation, when one common reason “is a guide and a light to them both; for it is not the per- “sons, but the case, and the reason therein, that is consider- “able altogether” (*l*).

In the case of the *Maria* (*m*), Lord Stowell expresses surprise that Vattel should mention a rule of International Law “as a law merely modern, when it is remembered that it is a “principle not only of the Civil Law (on which a great part “of the Law of Nations is founded), but of the private “jurisprudence of most countries in Europe—that a contu- “macious refusal to submit to fair inquiry infers all the “penalties of convicted guilt.”

XXXVII. Independently of the historical value of the Roman Law as explanatory of the terms and sense of treaties, and of the language of jurists, its importance as a repository of decisions, the spirit of which almost always, and the letter of which very frequently, is applicable to the controversies of independent States, can scarcely be over- stated (*n*).

(*k*) “Mirum tamen est hanc novam prudentiam, Romanos, a quibus ad omnes populos juris fecialis, justitiæ fontes purissimi manarunt, antea semper latuisse.”—*Boil. de Rep.* l. v. c. vi. p. 594.

(*l*) *Wiseman's Excellency of the Civil Law*, p. 110; *Burke, Works*, vol. viii. 185; *Letters on a Reg. Peace*.

(*m*) 1 C. *Rob. Adm. Rep.* p. 363.

(*n*) I am glad to find that the authority of Professor Mancini confirms the opinion which I have expressed:—

“D'altra parte, evocata la memoria del vecchio imperio de' Cesari, e ridestato per opera delle nostre Università lo studio del Dritto romano, l'autorità di questo antico deposito della sapienza italica veune risorgendo da per tutto, e finì (giovamento immenso alla civiltà avvenire!) per riguardarsi come un dritto comune obbligatorio di tutte le nazioni civili.”—*Della Nazionalità. Prelezione al corso di Dritto, etc.*, Torino, 1851, p. 15.

From this rich treasury of the principles of universal jurisprudence, it will generally be found that the deficiencies of precedent usage, and express international authority, may be supplied.

Throughout the greater portion of Christendom it presents to each State what may be fairly termed their own consent, bound up in the municipal jurisprudence of their own country; and this not merely to the nations of Europe, whose codes are built on the Civil Law, but to their numerous Colonies, and to the independent States which have sprung from those Colonies, and which cover the globe.

And so we find that the Roman law was more than once referred to as an authority, upon the international question of the Free Navigation of Boundary Rivers, by the President and diplomatic ministers of the United States of North America, in the discussion which took place between that Republic and the kingdom of Spain, as to the navigation of the Mississippi, in the year 1792. And to all nations, whatsoever and wheresoever, this Law presents the unbiassed judgment of the calmest reason, tempered by equity, and rendered perfect, humanly speaking, by the most careful and patient industry that has ever been practically applied to the affairs of civilized man.

It may be fairly said, that many International disputes in time of peace might be adjusted by this arbiter, assisted by the helps, and modified by the other sources which will presently be considered; certainly it may be most truly affirmed, that the greater number of controversies between nations would find a just solution in this comprehensive system of practical equity. "*Dixi sæpius,*" said Leibnitz, "*post scripta Geometrarum nihil exstare quod vi ac subtilitate cum Romanorum scriptis comparari possit: tantum nervi inest, tantum profunditatis . . . . nec uspiam juris naturalis præclare exculti uberiora vestigia deprehendas; et ubi ab eo recessum est, sive ob formularum ductus, sive ex majorum traditis, sive ob leges novas, ipsæ consequentiæ, ex nova hypothesis æternis rectæ rationis dictaminibus*"

“additæ, mirabili ingenio nec minore firmitate deducuntur”(o).

So the English civilian before quoted observes (p): “And, moreover, by, as it were, a general consent of nations, there is an appealing to, and a resting in, the voice and judgment of the Civil Law in these cases between nation and nation. The reason whereof is, because any thing that is irrational, unnatural, absurd, partial, unjust, immodest, ignoble, treacherous, or unfaithful, that law abhorreth; and for that it is the most perfect image and representation of nature, and of the equity and reason nature prescribes to humane actions, that was ever yet presented or set forth to the world in a law.”

In the negotiations between the United States of North America and Spain which have been already mentioned, the provisions of the Roman Law were cited with respect to the public character of rivers, to the use of the shores as incident to the use of the water, and to the occasional extension of this incidental right, when circumstances rendered it necessary that the cargo should be removed further inland, the shores being, for some reason, an unsafe place of deposit (q).

XXXVIII. It is hardly necessary to guard against the supposition that what has been said applies to the technical and formal parts of the Roman Code, the “formularum ductus” just mentioned, or to those which related exclusively to the particular policy of the empire; but it should be remarked, that an error of this description tinged the early writings upon International Law, and tended to bring the science itself into disrepute (r). It is the “solida et

(o) *Op.* iv. 254.

(p) *Wiseman's Excellency of the Civil Law*, p. 110; *Burke, Works*, vol. viii., 185: *Letters on a Reg. Peace*.

(q) *Wheaton's Hist.* pp. 510, 511; *Waites' American State Papers*, x. 135-140; *Instit.* l. ii. t. i. ss. 1-5.

(r) *Grotius, de J. B. et P.* l. iii. c. ix. s. 1, *De Postliminio*: “Accuratius hæc res a veteribus Romanis tractata est, sed sæpe confuse nimis, ita ut quæ juris gentium, quæque civilis Romani esse vellent,

“mascula ratio” of Bynkershoek which must guide and enforce the application of it to the affairs of independent nations.

Besides the actual compilations of Roman Law, the Commentaries upon them—for the like reason of their comprehensiveness, impartiality, wisdom, and enlarged equity—are of great use and constant service in elucidating the rules of justice between nations.

For instance, every writer on the Law of Embassy relies for the elementary propositions relating to it upon the Commentary of Huber on the Civil Law; and so Lord Stowell, in the case of the *Twee Gebræders*, fortified his judgment as to the legal marks of territory, and the evidence by which it is to be supported, by reference to the opinions of *Farrinacius*, *Gail* and *Loccenius* (s).

The decisions contained in the Roman Law may often form a safe guide even between nations in whose Municipal Code it has no root; in the interpretation, for example, of agreements, express or tacit, between European and Asiatic nations, and in the equitable resolution of doubts and difficulties unforeseen and unprovided for by the letter of any compact (t).

lector nequiret distinguere.” . . . iv. s. 2: “Sed hæc ratio Romanorum propria non potuit constituere jus gentium,” &c.

*Heineccius*, *Prælect. ad Grotium, Proæmium*, s. 54, and in his work *Jus Naturæ et Gentium, Præfatio*, p. 14, shows how the “Glossatores” erred in their application of portions of the Roman law to International questions.

It will be seen, when the subject of embassies is treated of, into how serious an error the English civilians were led by applying the text of the Roman law respecting legati as the rule of International law upon the question of the privileges of the ambassador of Mary Queen of Scots.

(s) 3 *C. Rob. Adm. Rep.* pp. 338, 348, 349.

(t) The learned judges of the English Privy Council, in deciding questions arising out of the law and customs of Hindostan, have made reference to the analogies furnished by Roman law.—*Sootragum Satputty v. Sabitra Dye*, 2 *Knapp's Privy Council Reports*—a case on the law of Hindoo adoption.

XXXIX. Analogy (*u*) has great influence in the decision of International as well as of Municipal tribunals; that is to say, the application of the principle of a rule, which has been adopted in certain former cases, to govern others of a similar character as yet undetermined. Of course the justice and force of this application must chiefly depend, in each case, on the closeness of the parallel between the circumstances of the precedents appealed to and those of the cases in dispute.

(*u*) *Bynkershoek, de Foro Ley. c. iii. p. 446.*

"By the ancient law of Europe, such a consequence (*i. e.* the condemnation of the ship on account of a contraband cargo) would have ensued; nor can it be said that such a penalty was unjust, or not supported by the *general analogies of law*."—*Lord Stowell, The Maria, 1 C. Rob. Adm. Rep. 90.*

"Is qui jurisdictioni præest ad similia procedere et ita jus dicere debet."—*Dig. l. i. t. iii. s. 12.*

"Semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas et ad eas res pertinerent, quæ quandoque similes erunt."—*Ib. 27.*

"De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est: et si qua in re hoc deficeret, tunc quod proximum et consequens est."—*Ib. 32.*

"Si quid in edicto positum non inveniatur, hoc ad ejus regulas ejusque conjecturas et imitationes possit nova instruere auctoritas."—*Cod. l. i. t. xvii. 2, 18.*

*Savigny, R. R. i. s. 46; Auslegung der Gesetz-Analogie.*

*Bowyer's Readings, p. 88:* "Analogy is the instrument of the progress and development of the law." See some good observations on the use of analogy in the English Law in the cases of *Mirchouse v. Rennell, 8 Bingham Rep. 518; Bond v. Hopkins, 1 Schoales and Lefroy Rep. 420.*

## CHAPTER V.

## CONSENT OF NATIONS.

**XL.** THE next and only other source of International Law is the *consent* of Nations. The obligations of Natural and Revealed Law exist independently of consent of men or nations, and although the latter acknowledge no one superior upon earth, they, nevertheless, owe obedience to the laws which they have agreed to prescribe to themselves, as the rules of their intercourse both in peace and war (*a*).

How and where is this consent expressed? It is not indeed to be found in any one written code: but this may be the case with the Municipal or Common Law of any country, as it was till lately with the institutions of every European nation, and as it is now with those of Great Britain.

**XLI.** This consent is expressed in two ways:—1. It is openly expressed by being embodied in positive conventions or treaties. 2. It is tacitly expressed by long usage, practice, custom,—“*Jus moribus et tacito pacto introductum*” (*b*),—according to Grotius; or, in the precise

(*a*) “*Quum enim gentes nulla superiore in terris contineantur, sunt illis pro legibus, quæ ipsi sibi dixere; vel scriptis tabulis vel moribus introductis, qui sæpe scripturis istis comprobantur.*”—*Leibnitz, Dissertatio* 11, “*De actorum publicorum usu atque de principiis juris naturæ et gentium,*” &c., s. i. p. 310.

“*Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes, aut plerasque, ex consensu jura quædam nasci potuerunt: et nata apparent, quæ utilitatem respicerent non cœtum singulorum, sed magnæ illius universitatis. Et hoc jus est quod jus gentium dicitur, quoties id nomen a jure naturali distinguimus.*”—*Grot. de J. B. et P. Proleg.* s. 17.

(*b*) *Grotii Proleg.* s. 1, *de Jure B. et P.*

language of Bynkershoek, “*Ipsum jus gentium, quod oritur e pactis tacitis et præsumptis quæ ratio et usus inducunt*” (c).

XLII. *Customs and usages* which have long subsisted between nations constitute a law to them: “*Nec negamus*,” says Grotius, “*mores vim pacti accipere*” (d). Each State has a right to count upon the presumption of their continuance: in no instance are they to be lightly departed from by any single nation; never without due notice conveyed to other countries, and then only in those cases in which it may be competent to a nation so to act.

For instance, a State may refuse—though it would be a defeasance of comity bordering upon hostility—to receive the resident Ambassador of another State; but if it does receive him, it must accord to him the full privileges of his station: they are secured to him by the universal consent of all nations, which it is not competent to any individual nation at her pleasure to abrogate or deny.

So in the case of the *Louis*, Lord Stowell reversed the sentence of a Vice-Admiralty Court, which had condemned a French ship for being employed in the slave trade, and resisting the search of a British cruiser, saying, “that neither a British Act of Parliament, nor any Commission founded on it, can affect any right or interest of foreigners, unless they are founded upon principles, and impose regula-

(c) *Questiones Juris Publici*, l. iii. c. x. Again he says, “*Ut in omni argumento, quod de jure gentium est, ratio et usus faciunt utramque paginam.*”—*Ib.* c. v.

(d) *Lib.* ii. c. v. s. 24, p. 259. “It is my duty not to admit that, because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, I am, on that account, under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice, from the earliest history of mankind.”—*The Flad Oyen*, 1 C. Rob. Adm. Rep. pp. 139–140. See, too, *Vattel*, ii. l. iv. c. vii. s. 106.

*Bynkershoek, de Foro Legatorum*, c. v. *ad fin.*, speaking of the attempt to subject a foreign prince to a municipal tribunal by seizing some trifling property of his as it passed through the kingdom, says; “*Nec quicquam magis erit contra præsumtam si non testatam mentem gentium.*”



“tions that are consistent with the Law of Nations. That  
 “is the only Law which *Great Britain* can apply to them ;  
 “and the generality of any terms employed in an Act of  
 “Parliament must be narrowed in construction by a religious  
 “adherence thereto ” (e).

The force of International Custom is emphatically expressed by Grotius in the phrase often repeated by him, “*Placuit gentibus*” (f); and still more in the phrase, “*Christianis in universum placuit*”(g). Bynkershoek speaks of “*illa perpetuo usu inter diversos sui juris populos observata consuetudo*,” and repeatedly of the “*gentium usus*” as one of the two pillars of International Law.

Prince Talleyrand, in his note (19th December, 1814) to the Congress of Vienna, expostulated upon the violation of International Law contained in the arrangements which sanctioned the fresh partition of Poland, and the annexation of parts of Saxony to Prussia. He said that such arrangements would tend to establish the principle “that the  
 “nations of Europe are united to each other by no other moral  
 “ties than those which unite them to the islanders of the  
 “Pacific; that they live among each other under the pure law  
 “of nature, and that what is called the Public Law of Europe  
 “does not exist; since although all the civil societies of the  
 “earth are, wholly or partially, governed by usages which  
 “constitute laws, the customs which are established between  
 “the nations of Europe, and which they have universally,  
 “constantly, and reciprocally observed for three centuries,  
 “do not form a law for them; in one word, that there is no  
 “other law but that of force”(h).

(e) 2 *Dodson Adm. Rep.* p. 239.

(f) *De J. B. et P.* l. ii. c. xviii. 4, s. 5; l. iii. c. vi. 3; c. vii. 5, s. 2.

(g) *Lib.* iii. c. vii. 9, s. 1. “*Hoc saltem . . . perfecit reverentia Christianæ legis.*”—*Ib.*

As to preserving women from violence: “*Atque id inter Christianos observari par est, non tantum ut disciplinæ militaris partem, sed et ut partem juris gentium.*”—*Lib.* iii. c. v. xix. s. 2; cf. *The Flad Oyen*, 1 *C. Rob. Adm. Rep.* 141 (*Lord Stowell*).

(h) *Wheaton's History of the Law of Nations*, p. 429.

*Klüber, Acten des Wiener Congresses*, Band vii. s. 48.

XLIII. Lord Stowell frequently expressed his entire concurrence with the opinions of preceding jurists as to the great and inestimable influence of Custom upon the Rights and Duties of Nations. Speaking of the condemnation of a ship in a neutral country, he says: "It has been contended that such a sentence is perfectly legal, both on principle and authority. It is said that, on principle, the security and consummation of the capture is as complete in a neutral port as in the port of the belligerent himself. On the mere principle of security it may perhaps be so; but it is to be remembered that this is a matter not to be governed by abstract principles alone; the *use* and *practice* of nations have intervened, and shifted the matter from its foundations of that species: the expression which Grotius uses on these occasions (*placuit gentibus*) is, in my opinion, perfectly correct, intimating that there is a use and practice of nations, to which we are now expected to conform" (i).

In another case (j), he says: "This is a position in which I am justified by the general *practice* of mankind, and the practice of mankind forms one great branch of the law of nations." Throughout his celebrated judgment in *The Maria* (k) he relies invariably upon "the law and practice of nations." And again, in *The Santa Cruz*, after having observed that there is no statute of the British Parliament upon the subject of Prize which directly applies to recapture, he continues: "But there is a *law of habit*, a *law of usage*, a *standing and known principle*, on the subject in all civilized and commercial countries: it is the common practice of European States in every war to issue proclamations and edicts on the subject of Prize; but till they appear, Courts of Admiralty have a *law* and a *usage* on which they proceed, from *habit* and *ancient practice*, as regularly as

(i) *The Henrick and Maria*, 4 C. Rob. Adm. Rep. pp. 54, 55.

(j) *The Progress*, 7 C. Rob. Adm. Rep. p. 220.

(k) 1 C. Rob. Adm. Rep. pp. 350, 362, &c. See too *The Flad Oyen*, *Ib.* 140, 141.

“they afterwards conform to the express regulations of their Prize Acts” (l).

Similar expressions abound in the luminous expositions of International Law which these judgments afford.

XLIV. The Law of Nations has received continual accessions and improvements since the first cultivation of it in the Christian world; not only have evil customs been abrogated, but the rigour of many ancient customs has been softened and relaxed in their application, without any departure from the principle on which they were founded. This effect is happily described by Lord Stowell; when speaking of contraband articles found on board a neutral vessel, he says, “I do not know that *under the present practice of the Law of Nations* a contraband cargo can affect the ship. By the *ancient law of Europe*, such a consequence would have ensued; nor can it be said that such a penalty was unjust, or not supported by the general *analogies of law*, for the owner of the ship has engaged it in an unlawful commerce. But in the *modern practice of the Courts of Admiralty of this country, and I believe of other nations also*, a *milder rule has been adopted*” (m). On the other hand, usage has decided that many things are contraband in naval war concerning which there had formerly been much dispute. Valin says, honestly and boldly, in his Commentaries, “*De droit ces choses sont de contrabande aujourd’hui et depuis le commencement de ce siècle, ce qui n’était pas autrefois néanmoins*” (n). There must be, however, a reciprocity (o) in the conduct of the nation demanding from another nation the privilege of these mitigations introduced by usage into the ancient Law; and a nation may be estopped

(l) 1 C. Rob. Adm. Rep. p. 61.

*The Mercurius*, 1 C. Rob. Adm. Rep. p. 82: “Under the modern law of nations.” *The Maria*, *Ib.* 371 a: “According to the modern understanding of the law of nations.”

*The Santa Cruz*, 1 C. Rob. Adm. Rep. p. 65; *The Elisebe*, 4 *Ib.* p. 421.

(m) *The Ringende Jacob*, 1 C. Rob. Adm. Rep. p. 90.

(n) *Ordonnance de la Marine*, l. iii. t. ix. art. xi.

(o) *The Santa Cruz*, 1 C. Rob. Adm. Rep. pp. 49, 64.

by its usage from claiming the benefit of a principle of the Law of Nations which would operate in its favour.

XLV. Such is the influence of universal usage, that it will in some measure affect even the stipulations of a treaty made long prior to the commencement of that usage, and at a time when the law, which has been since settled, was in a state of fluctuation and controversy (*p*).

In 1654, a treaty was entered into between England and Portugal, by which, among other things, both countries mutually bound themselves not to suffer the ships and goods of the other taken by enemies, and carried into the ports of the other, to be conveyed away from the original owners or proprietors. "Now, I have no scruple in saying" (observes Lord Stowell, in 1798), "that this is an Article incapable of being carried into literal execution, according to the modern understanding of the Law of Nations, for no neutral country can interpose to wrest from a belligerent prizes lawfully taken" (*q*). This is, perhaps, the strongest instance that could be cited, of what civilians call the "*consuetudo obrogatoria*" (*r*).

XLVI. So the establishment of Courts of the Law of Nations in all civilized countries in time of war, is an institution introduced by civilized usage, and binding upon all civilized countries.

Neutral Nations in time of War have now no right (*s*), when they are injured, to exact compensation from the countrymen of the aggressors (*t*), though the Barbary States were said by Lord Stowell to do so, "under a Law of Nations

(*p*) *The Maria*, 1 C. Rob. Adm. Rep. pp. 371-373.

(*q*) *The Santa Cruz*, 1 C. Rob. Adm. Rep. pp. 49, 64. See also vol. ii. p. 732, of Sir Leoline Jenkins's Works.

(*r*) Savigny, *System des Römischen Rechts*, b. i. 195.

Bynkershoek, *de Foro Legat.* c. xix. s. 7.

(*s*) Bynkershoek, *Observationes Juris Romani*, c. ii. vol. ii.: "Propulsatio vis atque injuriæ quo sensu juri gentium tribuatur."

(*t*) *The Maria*, 1 C. Rob. Adm. Rep. p. 373; *The Walsingham Packet*, Ib. p. 83; *The Snipe and others*, Edwards' Adm. Rep. p. 412.

“now peculiar to themselves” (u). Neither in time of Peace are Nations entitled to have recourse to Reprisals, until reparation for the injury sustained has been formally asked and denied, both of the proper tribunal, and of the government, *in re minime dubia*.

These points, however, will receive a fuller discussion in another part of this work.

(u) *The Kinder Kinder*, 2 C. Rob. Adm. Rep. p. 88.

## CHAPTER VI.

## HISTORY—TREATIES.

XLVII. SUCH being the influence of usage upon International Law (*a*), it becomes of importance to ascertain where the repositories, and what the evidence, may be of this great source of International Law.

XLVIII. (1.) In the enumeration of these, History, unless the term be too general, necessarily takes the first place. It supplies, according to Grotius, both example and authoritative judgments—of which the latter owe their weight to the general acceptance which they have obtained, whilst the former are more or less valuable according as they are more or less derived from epochs and nations more or less entitled to universal respect (*b*).

It is scarcely necessary to guard against the error which

(*a*) “Quamquam enim nec sit exemplis judicandum, et aurea ea dicitur Justiniani lex, ab exemplis tamen duci probabilem conjecturam certum est, et in dubio judicandum imo est exemplis; et cum itum in consuetudinem est. Neque enim mutare decet quæ certam observantiam semper habuerunt, et firmius judicium creditur, quod plurimorum sententiis confirmatur.”—*Albericus Gentilis*, lib. i. c. ii. *De Jure Belli*.

(*b*) “History,” Hume observes, “the great mistress of wisdom, furnishes examples of all kinds; and every prudential as well as moral precept may be authorised by those events which her enlarged mirror is able to present to us.”—*Hist. of England*, vol. vii. p. 150. *Grot. Proleg.* s. xlv. : “Historiæ duplicem habent usum, qui nostri sit argumenti: nam et exempla suppeditant et judicia. Exempli, quo meliorum sunt temporum ac populorum, eo plus habent auctoritatis; ideo Græca et Romana vetera cæteris prætulimus. Nec spernenda judicia, præsertim consentientia; jus enim naturæ, ut diximus, aliquo modo inde probatur; jus vero gentium non est ut aliter probetur.”

*The Flad Oyen*, 1 C. Rob. Adm. Rep. p. 141.

Grotius, in another part of his work, denounces—that instances recorded in History, merely by virtue of being so recorded, constitute precedents of International Law (*c*).

History is a record of the injustice, evil passions, and folly, as well as of the justice, virtues, and wisdom of Nations.

The necessities of the epoch in which Grotius wrote left him little or no choice in selecting his examples and precedents chiefly from the antiquity of Greece and Rome. This is not the case with his successors; they have far ampler and far apter materials. But the edifice is not the weaker for the breadth and depth of the classical foundations laid by the first architect; and the principle which guided him is in this, as in most other instances, most valuable to the later and, in spite of their advantages, inferior builders.

XLIX. (2.) Secondly, the consent of Nations is evidenced by the contents of Treaties, which for this, as well as for other reasons, constitute a most important part of International Law (*d*).

L. Upon this point there is one observation which merits, from its importance, precedence over all others. It is this: No treaty between two or more Nations can affect the general principles of International Law prejudicially to the interest of other Nations not parties to such covenant; at the same time, the contracting parties (*e*) may introduce

(*c*) “Solet et illud queri, an jure talionis interfici, aut male tractari legatus possit ab eo veniens, qui tale quid patrauerit. Et sunt quidem ultionis talis exempla in historiis satis multa: sed nimirum historie non tantum quæ justæ, sed et quæ iniquæ, iracundæ, impotenter factæ sunt, memorant.”—*Grot.* l. ii. c. xviii. 7.

(*d*) “All this body of old conventions, composing the vast and voluminous collection called the *Corps diplomatique*, forms the code or statute law, as the methodized reasonings of the great publicists and jurists form the digest and jurisprudence of the Christian world. In these treasures are to be found the usual relations of peace and amity in civilized Europe.”—*Letters on a Regicide Peace*, Burke, Works, vol. ix. p. 235.

(*e*) “Usus intelligitur ex perpetua, quodam modo, paciscendi edicendique consuetudine; pactis enim principes sæpe id egerunt in casum belli, sæpe etiam edictis contra quoscunque, flagrante bello. Dixi, ex perpetua quodam modo consuetudine, quia unum forte alterumve pactum,

into a treaty expressions so generally worded as to be either explanatory of a previously contested point of law, or declaratory of the future interpretation of it, or in other ways frame the covenants of the Treaty between themselves so as to lay down an universal principle binding on them, at least, in their intercourse with the rest of the world. Nowhere will this important doctrine be found laid down with greater precision, or more irresistible argument, than in Lord Grenville's speech in the House of Peers, upon the motion for an address to the throne approving of the convention with Russia in 1801 (*f*). Among the many attributes of a statesman possessed in rare excellence by that minister, was his intimate acquaintance with International Jurisprudence in all its branches. His opinion is, therefore, of very great authority. He argued that, by the language of that convention, a new sense, and one hitherto repudiated by Great Britain, with respect to *contraband of war*, would be introduced, so far at least as Great Britain was concerned, into *general International Law*; that inasmuch as some provisions of the Treaty with respect to what should be considered *contraband of war* were merely *prospective*, and confined to the *contracting parties*, England and Russia, while other provisions of the same Treaty were so couched in the preamble, the body, and certain sections which contained them, as to set forth, not the concession of a *special* privilege to be enjoyed by the contracting parties *only*, but a *recognition of one universal pre-existing right*, they must be taken as laying down a *general rule* for all future discussion with *any Power whatever*, and as establishing a principle of law which was to decide *universally* on the just interpretation of the technical term *contraband of war*.

quod a consuetudine recedit, jus gentium non mutat."—*Bynkershoek, Questiones Juris Publici*, l. i. c. x.

*Wheaton's El. of Int. Law*, i. 60.

(*f*) This speech was published separately, by Cobbett and Morgan, Pall Mall, November 13, 1802.

See, too, Hansard's Parliamentary Debates, 1801.



LI. The constant consent of various nations to adopt a particular interpretation of a particular term is, generally speaking, strong evidence that such is the true International meaning belonging to it. Bynkershoek was in the habit of placing great stress upon the language of Treaties, as evidence of the universal consent of nations, and especially on this point (*g*): “*Excute pacta gentium, quæ diximus, excute*” “*et alia, quæ alibi exstant, et reperies, omnia illa appellari*” “*contrabanda, quæ, uti hostibus suggeruntur, bellis gerendis*” “*inserviunt, sive instrumenta bellica sint, sive materia, per*” “*se bello apta;*” and, again, “*Priusquam autem, quid mihi*” “*videatur, exponam, operæ pretium erit, pactiones gentium*” “*consuluisse;*” again, “*Sed his paulisper sepositis audi*” “*pacta gentium;*”—these and the like expressions abound in his most valuable dissertations. Nor in this respect is he at variance with other jurists; it is their universal opinion that not only the particular provisions, but the general spirit, of Treaties to which at different periods many nations have been parties, is of great moment and account as the evidence of their *consent* to the doctrine contained in them. So Lord Stowell, in his judgment in *The Maria*, arguing for the universal right of the belligerent to visit neutral merchant ships, says: “The right is equally clear in practice, for practice” “is uniform and universal upon the subject: the many” “European Treaties which refer to this right refer to it as” “pre-existing, and merely regulate the exercise of it” (*h*).

So the “*réponse sans réplique*,” already mentioned, of Great Britain to the Prussian memorial, and that memorial itself, refer to a variety of Treaties as containing provisions illustrative and confirmatory of the doctrine maintained in the reply.

LII. When, however, it is said that the consent of nations may be gathered in some degree from the conventions of Treaties, it is not meant that *every kind* of Treaty can

(*g*) *Quæstiones Juris Publici*, l. i. c. x. 113.

(*h*) 1 *C. Rob. Adm. Rep.* p. 380.

furnish even this degree of evidence. Many are concerned with matters of no *general* (i) interest to other than the contracting parties; many contain stipulations wrung from the necessities of one party, compelled to admit claims to which by the general law its adversary was not entitled (j). From Treaties of this description no argument of the consent of Nations can be fairly deduced. But there are certain great and cardinal Treaties in which, after long and bloody wars, a re-adjustment of International relations has taken place, and which are therefore more especially valuable, both from the magnitude and importance of their provisions, which have necessitated a recurrence to, and a re-statement of, the fundamental principles of International Law; and also from the fact, that frequently the greater number of European States, and lately some American and even Asiatic communities, have been parties thereto (k).

This subject will come again under discussion in a subsequent consideration of the general subject of Treaties (l). It may, however, be as well to mention in this place that the

(i) "By this means the proposed fraternity is hustled in the crowd of those treaties which imply no change in the public law of Europe, and which do not, upon system, affect the interior condition of nations. It is confounded with those conventions in which matters of dispute among sovereign powers are compromised, by the taking off a duty more or less, by the surrender of a frontier town or a disputed district on the one side or the other, by pactions in which the pretensions of families are settled (as by a conveyancer making family substitutions and successions), without any alterations in the laws, manners, religion, privileges, and customs of the cities or territories which are the subject of such arrangements."—*Burke, Works*, vol. viii. p. 234: *Letters on a Regicide Peace*.

(j) "Quod vero contra rationem juris receptum est, non est producendum ad consequentias."—*Dig. i. iii. s. 14 (De Legibus)*.

"Quæ propter necessitatem recepta sunt, non debent in argumentum trahi."—*Dig. i. xvii. 162: De Diversis Regulis Juris Antiqui*.

(k) "Tous les princes et états de l'Europe se trouvent ainsi directement ou indirectement compris dans ce traité, à l'exception du Pape et du Grand Seigneur, qui seuls n'y prirent aucune part."—*Koch, Hist. des Tr. c. i. 1, 3, in fine*.

(l) Vol. ii. ch. vi. vii. viii.

Treaties which have principally affected International Law, are (*m*):—

For Europe generally:—Westphalia (1648), to which every Sovereign and State on the Continent of Europe, except the Pope and the Grand Seigneur, was a party; Utrecht (1713); Paris and Hubertsbourg (1763); Paris (1814), and the Congress of Vienna.

A group of Treaties negotiated for the North of Europe only:—Oliva (1660); Kiel (1814), with the Ottoman Porte; Carlowitz (1699); Bucharest (1812).

The Treaties which have affected the relations between the Ottoman Porte and the European Powers generally:—

The Act of the Porte granting to British merchant vessels the privileges of commerce in the Black Sea (October 30, 1799).

The Convention concluded between the Courts of Great Britain, Austria, Prussia, and Russia, and the Sublime

(*m*) "Si l'on examine les révolutions qui ont contribué à constituer l'état actuel de l'Europe, on se convaincra qu'il y a peu de traités antérieurs à ceux de Westphalie, d'Oliva, et de Carlowitz, dont l'influence s'étende aux affaires générales, et au système politique de nos jours. L'étude des traités qui les précèdent ne laisse cependant pas d'avoir son utilité, parce que les stipulations qu'ils renferment sont souvent rappelées et confirmées dans des actes plus récents; que les prétentions des puissances dérivent en grande partie des anciens traités, et qu'enfin la connaissance de ceux-ci sert à étendre les vues de la politique; car plus on pénètre dans l'histoire des traités, plus on se rend propre aux négociations et aux travaux diplomatiques.

"Il serait superflu d'entrer dans un plus grand détail sur les avantages que procure la connaissance des traités; il suffit de remarquer qu'elle donne celle de l'état actuel de l'Europe, ainsi que des droits et des obligations réciproques des puissances. Elle est donc indispensable à tous ceux qui sont chargés du maniement des affaires publiques ou qui veulent s'y former. Elle n'est pas d'une moindre utilité à ceux qui étudient l'histoire en philosophes et en politiques.

"En suivant le fil des négociations, on découvre l'origine des événements qui ont changé la face du monde politique et produit l'état de choses qui règne aujourd'hui en Europe. Cette étude conduit donc à la vraie connaissance de l'histoire, et nous met en état de relever beaucoup d'erreurs commises par les historiens qui ont négligé d'approfondir les traités."—*Koch, Hist. des Tr. Préf.*

Ottoman Porte, for the Pacification of the Levant, signed at London, July 15, 1840.

The Treaty of July 13, 1841, as to the Navigation of the Dardanelles and the Bosphorus, which incorporated into the written Law of Nations the conventional maxim as to territorial jurisdiction over adjacent waters, revised and altered by Treaty of Paris (already mentioned), 1856.

The Treaty of Paris (with the Conventions annexed to it), March 30, 1856, between England, Austria, France, Prussia, Russia, Sardinia, and the Porte, by which the independence and integrity of the Ottoman Empire are secured, and this Empire is admitted "into the Public Law and "System of Europe."

The *Declaration* respecting Maritime Law was signed by the Plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in Congress at Paris, April 16, 1856.

The Treaty of Prague, 1866, was made at the close of the war by which Prussia destroyed the old German *Bund*, obtained for herself the supremacy which Austria once had in Germany, and seized without scruple or justification large portions of her weaker neighbours' territories—a fate which even the ancient Free City of Frankfort could not escape (*n*).

(*n*) See *Overthrow of the Germanic Confederation in 1866*, by Sir A. Malet, 1870. The ancient free city of Frankfort, he says, "obtained, by special favour of the King of Prussia, reimbursement of a portion of the contribution which was exacted; but the Government is abolished, and the city is reduced to a Prussian town of the third rank."—*Chap. xxv. p. 384.*

*Article IV. of the Treaty of Prague.*—"His Majesty the Emperor of Austria recognizes the dissolution of the late German Bund, and gives his consent to a new formation of Germany, in which the Imperial State of Austria shall take no part. Moreover, his Majesty promises to recognize the closer Federal relations which his Majesty the King of Prussia is about to establish north of the line of the Maine, and also agrees that the German States to the south of this line shall form an union, the national connection of which with the northern confederacy is reserved for a more definite agreement between both parties, and which is to maintain an international independent existence."

The Treaty which established the Kingdom of Greece (1832); and that which established the Kingdom of Belgium (1831), the provisions of which were afterwards superseded by the Treaty of April 19, 1839.

The amalgamation of the various Italian States into the Kingdom of Italy is not recorded in any Treaty or Treaties.

The union of Lombardy with Piedmont is recorded in the Treaty or Treaties of Zürich (November 11, 1859), between Austria, France, and Sardinia. Austria adopted the course with respect to Lombardy (*o*) which she afterwards pursued with respect to Venetia—namely, that of ceding the territory to France, who transferred it to Sardinia. Events, subsequently to the Treaties of Zürich, led to the formation of the present Italian Kingdom, which has been recognized by all Powers but the Pope.

The Principal Treaties between the United States of North America and the European Powers are—

The Treaty of Versailles (1783), containing the recognition of that Republic.

The Treaty of Ghent (December, 1814), between Great Britain and the United States, chiefly as to boundaries of their respective dominions in North America.

The Treaty of the United States of North America with the Confederation of Central America (December 4, 1845), should also be mentioned.

The international position of the Republics of Honduras and Nicaragua, in Central America, was materially affected by the claims of Great Britain to the Protectorate of the Mosquito territory. The Treaty called the Clayton-Bulwer Treaty, and the subsequent explanatory Dallas-Clarendon Treaty, which the United States' Senate refused to ratify, failed to remove the dispute between Great Britain and the United States of North America relative to these Republics. But by a Treaty between Great Britain and Honduras, November 28, 1859, and with Nicaragua, August

28, 1860, relinquishing the Mosquito Protectorate, these troublesome questions were finally set at rest (*p*).

The Treaty between Russia and Persia, signed at Seïwa (1813), and confirmed at Tiflis, under the mediation of Great Britain, in which Persia recognized the exclusive right of Russia to have ships of war in the Caspian Sea.

The Treaty between Great Britain and Persia, signed at Tehran, November 25, 1814, followed by the royal order of the Shah relative to the trade of British subjects in Persia (*q*).

LIII. These Treaties furnish one of the many reasons why the science of International Law has made such progress since the Treaty of Westphalia, which is usually considered as the first great adjustment of International Relations on the Continent of Europe. It is, then, a sound maxim that a principle of International Law acquires additional force from having been solemnly acknowledged as such in the provisions of a Public Treaty.

LIV. How far a provision of a Treaty may be affected by its omission in a subsequent Treaty between the same Powers is a question of much gravity. When the independence of the United States of North America was acknowledged, the right of navigating the Mississippi was secured to the subjects of Great Britain as well as those of the United States by a Treaty (1783) between these two Powers: but in the Treaty of Ghent (1814), which put an end to the war between these Powers which had broken out in 1812, the stipulation of 1783 in favour of British subjects was not renewed, and it has been contended by the United States that the right belongs exclusively to their own subjects (*r*).

(*p*) They were constantly referred to in the speeches of Presidents of the United States. See *Ann. Register* for 1857, p. 345; for 1858, p. 283; for 1859, p. 274; for 1860, p. 284.

(*q*) In vol. ii. pt. viii. the International *status* of foreign Spiritual Powers, especially the Pope, is considered, and the History of *Concordata*, or treaties between such Powers and the State.

(*r*) *Wheaton's Hist.* 507, 508, 585.

When a Treaty, dealing with certain subjects, is silent as to others naturally connected with them, or leaves them on an indefinite and disputable footing, questions afterwards arising upon subjects of this latter class will then be decided according to the subsequent judgment and practice of nations, which must be looked to for exposition of these subjects; and when in a Treaty an enumeration is made of particular articles, or particular matters, according to the nature of the Treaty, this is held to be done in order to prevent misunderstanding, and not to warrant the inference, that the articles or matters excepted from the enumeration should be considered as tacitly sanctioned thereby: the rule "*Exceptio confirmat regulam*" is not applicable to cases of this description (*s*).

LV. The consent of Nations is also evidenced by the Proclamations or Manifestoes (*t*) issued by the Governments of States to the subjects of them upon the breaking out of war. These frequently contain, not only expositions of the causes which have led to this result, but also a defence of the conduct of the Government, founded upon a reference to the principles of International Law, in declaring an offensive or undertaking a defensive war.

These public documents furnish, at all events, decisive evidence (*u*) against any State which afterwards departs from the principles which it has thus deliberately and solemnly invoked; and in every case they clearly recognize the *fact*, that a system of law exists which *ought* to regulate and control the International relations of every State.

LVI. The Marine Ordinances or regulations of a State

(*s*) *The Ringende Jacob*, 1 C. Rob. Adm. Rep. p. 92 (Lord Stowell).

(*t*) *The Santa Cruz*, 1 C. Rob. Adm. Rep. 61.

(*u*) The remarks which Æschines so forcibly urges as to the advantage of public records, and the testimony they bear to the character of public men, is equally applicable to States: Καλὸν, ὃ ἄνδρες Ἀθηναῖοι, καλὸν ἢ τῶν δημοσίων γραμμάτων φυλακή· ἀκίνητον γάρ ἐστι καὶ οὐ συµμεταπίπτει τοῖς αὐτομολοῦσιν ἐν τῇ πολιτείᾳ, ἀλλ' ἐπέδωκε τῷ δήμῳ, ὅπῃ βούληται, συνιδεῖν τοὺς πάλαι μὲν πονηροὺς, ἐκ μεταβολῆς δ' ἀξιοῦντας εἶναι χρηστούς. —*Æschin. Orat. adv. Ctesiph.* s. 75.

afford valuable testimony, first, as to the practice of the State itself upon this branch of International Law; and also, in some degree, as to the usage of Nations as generally recognized at that time by the jurists and statesmen, and legislative assemblies of the country which issued them (x).

When the institutes of great maritime countries agree upon a question of International Maritime Law, they constitute a tribunal from which there can rarely, if ever, be any appeal.

Certain of these institutes, independently of their agreement or disagreement with other maritime codes, have always been held in the highest respect; and certainly no English writer or judge can be accused of national partiality for relying upon them (y). These are the celebrated "Consolato del Mare," with the commentary of Casaregis, and the French *Ordonnance sur la Marine* of 1681, with the commentary of Valin; and, due regard being had to the modern practice, the "*Collection des Lois maritimes antérieures au XVIII<sup>e</sup> Siècle*," by Pardessus.

LVII. The consent of Nations is also evidenced by the decisions of Prize Courts, and of the tribunals of International Law sitting in each country.

It has been already observed, that in time of war, neutral States have a right to demand *ex debito justitiæ* (z) that

(x) Wheaton states the proposition in a less limited shape.—*Elements of Intern. Law*, p. 101.

See *The Maria*, 1 C. Rob. Adm. Rep. *passim*, especially p. 368; *The Hoop*, 1 C. Rob. Adm. Rep. pp. 198, 199.

(y) *The Maria*, *passim*.

Oppenheim, *System des Völkerrechts*, Kap. v. s. 8.

"The venerable authority of the Consolato."—Lord Stowell, *The Henrick and Maria*, 5 C. Rob. Adm. Rep. p. 4.

"*Il Consolato del Mare*, cap. 273, expressly says, 'The enemy's goods found on board a friend's ship shall be confiscated;' and this is a book of great authority."—*The Duke of Newcastle's Letter to M. Michel*, note to first Proposition, p. 64.

(z) *The Snipe and others*, Edwards' Adm. Rep.; also published separately.



there be courts for the administration of International Law sitting in the belligerent countries (a).

The duties of those courts are faithfully described by Lord Stowell, in the case of the Swedish Convoy (b): "In forming my judgment, I trust that it has not for a moment escaped my anxious recollection what it is that the duty of my station calls for from me; namely, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the Law of Nations holds out, without distinction, to independent States, some happening to be neutral, and some belligerent: the seat of judicial authority is indeed locally *here*, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at *Stockholm*; to assert no pretensions on the part of *Great Britain* which he would not allow to *Sweden* in the same circumstances; and to impose no duties on *Sweden*, as a neutral country, which he would not admit to belong to *Great Britain* in the same character."

In another case (c), he says: "It is to be recollected that this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it is the administration of the *Law of Nations* simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable reluctance."

It cannot be denied that this theory of judicial duty breathes the very spirit of pure and impartial justice. It is to be remembered, also, that the simple enunciation of such a

(a) See important remarks of Mably, *Droit Public*, vol. iii. pp. 350, 351; and Wheaton, *Hist.* p. 171, note.

(b) *The Maria*, 1 C. Rob. Adm. Rep. p. 350.

(c) *The Recovery*, 6 Ib. p. 349.

theory is, to a certain extent, a guarantee for a corresponding practice on the part of the nation proclaiming it. It holds up the severest standard by which to measure the decisions of the court; and it witnesses beforehand, as it were, against any deviation from the path of duty thus emphatically pointed out.

The remark of Mr. Wheaton upon this theory, expounded, he admits, by "one of the greatest of maritime judges," is, that those whose interests are affected by those adjudications will always doubt whether the practice corresponds with the theory—especially in the case of a great maritime country, whose judge must, he thinks, unconsciously feel the national bias in favour of whatever operates to the encouragement of the national navy. These judgments, however, he says, if the principles upon which they are founded be rigorously examined, may be an instructive source of information upon Prize Law; and he himself enumerates "the adjudication of "Boards of Arbitrators and Prize Courts" among the sources of International Law, ascribing greater weight to the former than to the latter authority.

It is true that the value of the judgments referred to depends upon the principles, reasonings, and authorities upon which they rely; but it is the constant practice in these cases to state the *data* at length, as well as the judicial conclusion; and Mr. Wheaton himself does not suggest that the latter are often found inconsistent with the former.

In the very elaborate letter addressed, March 28, 1843, to the British Government, by Mr. Webster, then Foreign Secretary to the United States, that eminent person, after contending that there is no distinction between the right of *Visitation* and the right of *Search*, observes: "If such well-known distinction exists, where are the proofs of it? What writers of authority on the public law, *what adjudications in Courts of Admiralty*, what public Treaties, recognize it?" (d)

As reference has been, and must afterwards be made, in

the course of this work, to the judgments of Lord Stowell, and as it is important to mark the place which these are entitled to occupy among the sources of International Law, the opinion of American jurists with respect to them becomes valuable, and for many reasons. When they were delivered, the greater portion of Continental Europe was under the actual dominion, or at least the predominating influence, of France, which then disregarded all the authorities of the ancient Law of Nations. These judgments contain frequent references to French writers upon Maritime Law, and to Vattel generally, as a work of the highest authority. The assent or dissent therefore of France, and the countries subject to France *at that time*, could not affect the merit of these decisions. The United States of North America, however, were naturally inclined to favour France from motives of gratitude. These States composed a free maritime nation, daily increasing in all the elements of national greatness and prosperity; occupying an immense territory in the New World; avowedly adhering to the system of International Law (*e*) as acknowledged and received at the time when they became an independent kingdom: they were themselves, during a portion of the momentous period over which these decisions extend, a Neutral Power, upon whom the principles laid down in them pressed, however justly, with great and acknowledged severity; and during another portion a Belligerent, actuated by the keenest hostility against the country in which these judgments were delivered.

The verdict of such a nation is unquestionably entitled to great weight in matters of International Law, and not open to the charge, with respect to this epoch at least, of partiality to the Prize Tribunals of Great Britain. For this reason the opinion of Mr. Chancellor Kent upon the sub-

(*e*) *Commentaries upon American Law*, by Mr. Chancellor Kent, vol. i. p. 1, citing instance of the 4th of December, 1781; *Annals of Congress*, vol. vii. 185.

ject of Lord Stowell's judgments is very valuable. A portion of the Chancellor's work was devoted by him to the subject of International Jurisprudence, and it is certainly in no way inferior to the rest of the Commentaries which have earned for him a very high legal reputation in the Western hemisphere (f):—

“ In the investigation of the rules of the Modern Law of Nations, particularly with regard to the extensive field of maritime capture, reference is generally and freely made to the decisions of the English Courts. They are in the habit of taking accurate and comprehensive views of general jurisprudence, and they have been deservedly followed by the Courts of the United States on all the leading points of National Law. We have a series of judicial decisions in England and in this country, in which the usages and the duties of nations are explained and declared with that depth of research, and that liberal and enlarged inquiry, which strengthen and embellish the conclusions of reason. They contain more intrinsic argument, more full and precise details, more accurate illustrations, and are of more authority, than the loose *dicta* of elementary writers. When those courts in this country which are charged with the administration of International Law have differed from the English adjudications, we must take the Law from domestic sources; but such an alternative is rarely to be met with; and *there is scarcely a decision in the English Prize Courts at Westminster, on any general question of public right, that has not received the express approbation and sanction of our National Courts.* We have attained the rank of a great commercial nation; and war, on our part, is carried on upon the same principles of maritime policy which have directed the forces and animated the councils of the naval powers of Europe. When the United States formed a component part of the British empire, our Prize Law and theirs was the same; and after the revolution it continued

“to be the same as far as it was adapted to our circum-  
 “stances, and was not varied by the power which was  
 “capable of changing it. The great value of a series of  
 “judicial decisions in prize cases, and on other questions  
 “depending on the Law of Nations, is, that they render  
 “certain and stable the loose general principles of that Law,  
 “and show their application, and how they are understood, in  
 “the country where the tribunals are sitting. They are,  
 “therefore, deservedly received with very great respect, and  
 “are presumptive, though not conclusive, evidence of the Law  
 “in the given case. This was the language of the Supreme  
 “Court of the United States so late as 1815: and the  
 “decisions of the English High Court of Admiralty, espe-  
 “cially since the year 1798, have been consulted and  
 “uniformly respected by that Court as enlightened commen-  
 “taries on the Law of Nations, and affording a vast variety of  
 “instructive precedents for the application of the principles  
 “of that Law.”

Few names have obtained greater celebrity upon questions  
 of International Law than that of Dr. Story; and with his  
 opinion this branch of the subject may be concluded: “How  
 “few,” he says, “have read with becoming reverence and  
 “zeal the decisions of that splendid jurist—the ornament, I  
 “will not say, of his own age or country, but of all ages and  
 “all countries; the intrepid supporter equally of neutral and  
 “belligerent rights; the pure and spotless magistrate of  
 “nations, who has administered the dictates of universal  
 “jurisprudence with so much dignity and discretion in the  
 “Prize and Instance Courts of England!—Need I pronounce  
 “the name of Sir William Scott?”

During the last Russian war the English Prize Tribunals—  
 both the High Court of Admiralty and the Judicial Com-  
 mittee of the Privy Council—applied to the cases brought  
 before them the principles of the American and English  
 judgments as of equal authority.

During the late civil war in the United States the tri-  
 bunals of both belligerents professed to administer, and with

very few exceptions did administer, the law as already expounded by these Courts.

The seal of Courts of Admiralty, being also Courts of International Law, is *judicially* taken notice of, without positive proof of its authenticity, by the Courts of all Nations (*g*).

(*g*) *Yeaton v. Fry*, 5 *Cranch* (*American*) *Rep.* pp. 335, 343 (*Ch. J. Marshall*); *Thompson v. Stewart*, 3 *Con. (American) Rep.* p. 171; 2 *Kent's Commentaries*, p. 121, note. But the rule is different as to the seal of other foreign courts: *Delafield v. Hand*, 3 *Johns. (American) Rep.* p. 310; *Desobrey v. Laistre*, 2 *Harr. & Johns. (American) Rep.* p. 192; *Henry v. Adey*, 3 *East*, 221.

## CHAPTER VII.

## WRITERS ON INTERNATIONAL LAW.

LVIII. THE consent of nations is further evidenced by the concurrent testimony of great writers (*a*) upon International Jurisprudence. The works of some of them have become recognized digests of the principles of the science; and to them every civilized country yields great, if not implicit, homage (*b*).

When Grotius wrote his immortal work he derived but little help (*c*) from any predecessor in the noble career which

(*a*) See some very sensible remarks on this head, by *M. Ortolan*, *Diplomatie de la Mer*, l. i. c. iv. t. i. p. 74, &c.

"Text writers of authority showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent," are placed as the second branch of International Law by *Wheaton*.—*El. of Int. Law*, vol. i. p. 59.

(*b*) The English courts of Common Law, and English commentators upon that law, both in cases of public and private International Law, have been in the habit of referring to other works of these foreign authors, as containing evidence of the law to be administered in England: *e. g.* see *Comyn's Digest*, tit. Ambassador, where *Grotius* is cited. See the authorities cited by *Lord Mansfield* in the cases relating to ambassadorial privileges, mentioned in a later part of this work; and see the whole part of this work on *Comity*, or *Private International Law*. *Lord Mansfield*, in fact, built up the fabric of English Commercial Law upon the foundation of the principles contained in the works of foreign jurists. In the Admiralty and Ecclesiastical Courts, these works had been always referred to as authorities. It is by these courts indeed, and the practitioners therein, that the study of Civil and International Law was alone preserved from perishing in these Islands: the seed was sown and kept alive in them, which subsequently bore fruit of which no country need be ashamed.—See *Preface*, by *Dr. Phillimore*, to *Sir G. Lee's Reports*.

(*c*) *Grotii Prolegomena*, xxiii., as to the *auxilia scripti* which he had.

"Solent autem gentium sententiæ de eo quod inter illas justum esse

he chose for himself. Albericus Gentilis, Arthur Duck, and Suarez had indeed left him materials of which he fully availed himself, as well as of the labours of publicists like Ayala and Bacon, and of the commentators on the Civil and Canon Law; but he may be almost said to have himself laid the foundation of that great pillar of International Law—the authority of International Jurists. His own book, one of the firmest barriers yet erected by Christendom against barbarism, and the works of some subsequent writers upon the same subject, have long obtained the honour of being the repositories to which nations have recourse for argument to justify their acts or fortify their claims. They are, indeed, with the modifications that reason and usage apply, admitted umpires in International disputes; and this fact has greatly contributed, and still does contribute, to clothe the Law of Nations, more and more, with the precision and certainty of positive and municipal law.

The value ascribed to the opinion (*d*) of each writer, in the event of there being a difference between them, is a point upon which it is impossible to lay down a precise rule; but among the criteria of it will be the length of time by which it is, as it were, consecrated, the period when it was expressed, the reasoning upon which it rests, the usage by which it has been since strengthened, and to the previous existence of which it testifies (*e*).

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debet triplici modo manifestari, moribus scilicet et usu, pactis et fœderibus, et tacita approbatione juris regularum, a prudentibus ex ipsis rerum causis per interpretationem et per rationem deductarum.”—*Warnkönig, Doctrina Juris Philosophica Aphorismis Distincta* (a most valuable little work), s. 146 p. 190.

(*d*) No rule of International Law exists like that of the Imperial Law of Rome, which decided that the opinions of *Papinianus*, *Paulus Gaius*, *Ulpianus*, and *Modestinus* should have the force of law; that in points where they differed, the opinion of the majority, and, where they were equally divided, the side on which *Papinianus* was found, should prevail.—*Th. Cod. i. 4, De responsis Prudentum L. un.; Ib. ix. 3, L. un. Pr. de Sent. Pass.; Cod. ix. 51, 13 de Sent. Pass.; Mühlenbruch, Doctr. Pand. Pr. s. 8.*

(*e*) *Vattel* cited “as a witness as well as a lawyer.”—*The Maria*, 1 *C. Rob. Adm. Rep. p. 363.* See the case generally on this point.



When, on the other hand, their authority, in the absence of any contrary usage or convention, may be safely said to be binding upon all nations: "All writers upon the Law of Nations unanimously acknowledge it," is not the least of Lord Stowell's arguments for the Belligerent's right of search (*f*).

"In cases where the principal jurists agree," Chancellor Kent says, "the presumption will be very great in favour of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers of International Law" (*g*).

And how great is the advantage of this, that a controversy between France and England should be capable of being referred to principles laid down by an arbitrator who existed long before the disunion arose, and whom it is impossible to accuse of partiality! This remark supposes the reference made to a neutral jurist, belonging to neither country; but the advantage is not so limited—it may be that the authorities belonging to the very country which is urging a demand will be found to pronounce against it.

If the authority of Zouch, of Lee, of Mansfield, and, above all, of Stowell, be against the demand of England—if Valin, Domat, Pothier, and Vattel (*h*) be opposed to the pretensions of France—if Grotius and Bynkershoek confute the claim of Holland—Puffendorf (*i*) that of Sweden—if

(*f*) *The Maria*, 1 C. Rob. Adm. Rep. p. 360.

(*g*) *Kent's Commentaries*, vol. i. p. 19.

(*h*) "I stand with confidence upon all fair principles of reason—upon the distinct authority of *Vattel*—upon the *Institutes* of other great maritime countries as well as those of our own countries—when I venture to lay it down that, by the Law of Nations," &c.—*The Maria*, 1 C. Rob. Adm. Rep. p. 369.

(*i*) So, in the case of the *Swedish Convoy*, Lord Stowell said: "If authority is required, I have authority—and not the less weighty in this question for being *Swedish* authority; I mean the opinion of that distinguished person—one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced—I mean

Heineccius, Leibnitz, and Wolff array themselves against Germany—if Story, Wheaton, and Kent condemn the act of America, it cannot be supposed (except, indeed, in the particular epoch of a Revolution, when all regard to law is trampled under foot) that the *argumentum ad patriam* would not prevail—at all events, it cannot be doubted that it *ought* to prevail, and should the country relying upon such authority be compelled to resort to arms, that the guilt of the War would rest upon the antagonist refusing to be bound by it.

It is with reference to the authority of jurists that we find Lord Stowell using such expressions as these: “It is the necessary consequence acknowledged in *all books*.” “The institution (*i.e.* of a particular State with respect to a matter of the Law of Nations) must conform to the text law, and likewise to the constant usage upon this matter;” and again: “All writers upon the Law of Nations unanimously acknowledge it, without the exception of even Hubner himself, the great champion of neutral privileges.”

And Lord Mansfield, deciding a case in which the privileges of the attendant of an ambassador were concerned, said: “I remember, in a case before Lord Talbot, of *Buvot v. Barbut*, upon a motion to discharge the defendant (who was in execution for not performing a decree) ‘because he was agent of commerce, commissioned by the King of Prussia, and received here as such,’ the matter was very elaborately argued at the bar, and a solemn, deliberate opinion given by the court. These questions arose and were discussed: ‘Whether a minister could, by any act or acts, waive his privilege?’—‘whether being a trader was any objection against allowing privilege to a minister personally?’—‘whether an agent of commerce, or even a consul, was entitled to the privileges of a public minis-

*Baron Puffendorf*. . . . In the opinion, then, of this wise and virtuous *Swede* . . . his words are memorable. I do not overrate their importance when I pronounce them to be well entitled to the attention of *his country*.”

“ ‘ter?’—‘what was the rule of decision?’ Lord Talbot declared a clear opinion, ‘That the Law of Nations, in its full extent, was part of the law of England;’ ‘that the Act of Parliament was declaratory, and occasioned by a particular incident;’ ‘that the Law of Nations was to be collected from the practice of different nations, and the authority of writers.’ Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, &c., there being no English writer of eminence upon the subject” (k).

In truth, a reverence for the opinions of accredited writers upon Public and International Law has been a distinguishing characteristic of statesmen in all countries, and perhaps especially of those who have deserved that appellation in this kingdom.

It has been felt, and eloquently expressed by them, that though these writers were not infallible, nevertheless, “the methodized reasonings of the great publicists and jurists formed the digest and jurisprudence of the Christian world;” that their works contained principles which influenced every State, and constituted the permanent and embodied voice of all civilized communities; and that upon their decisions depended one of the best securities for the observance and preservation of right in the society of nations.

Sir James Mackintosh, in his speech on the annexation of Genoa to the kingdom of Sardinia, touched upon this important subject, in the following well-weighed and emphatic terms: “It is not my disposition to overrate the authority of this class of writers, or to consider authority in any case as a substitute for reason. But these eminent writers were, at least, necessarily impartial. Their weight, as bearing testimony to general sentiment and civilized usage, receives a new accession from every statesman who appeals to their writings, and from every year in which no contrary practice

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(k) *Triquet v. Bath, Peach v. Same*, 3 Burrows' Rep. 1480.

*Burke's Works*, vol. viii. p. 235: *Letters on a Regicide Peace*.

“is established, or hostile principles avowed. Their works  
 “are thus attested by successive generations to be records of  
 “the customs of the best times, and depositories of the deli-  
 “berate and permanent judgments of the more enlightened  
 “part of mankind. Add to this, that their authority is  
 “usually invoked by the feeble, and despised by those who  
 “are strong enough to need no aid from moral sentiment,  
 “and to bid defiance to justice. I have never heard their  
 “principles questioned, but by those whose flagitious policy  
 “they had by anticipation condemned” (l).

In the same spirit Cicero had long ago observed: “Qui  
 “peritis non putat esse obtemperandum, non homines lædit,  
 “sed leges ac jura labefactat” (m).

(l) *The Miscellaneous Works of Sir J. Mackintosh*, vol. iii. p. 342.

(m) *Cicero, pro Cæcina*, ss. 23-25.

*Suarez* has the following remarks concerning what he designates the *doctrinalis interpretatio* of Laws: “De hac igitur interpretatione certum est, non habere vim legis, quia non procedit a potestate jurisdictionis, sed a scientia, et judicio prudentum; et ideo dicimus per se non inducere obligationem. Quia vero in omni arte judicium peritorum in illa magnam inducit probabilitatem, ideo etiam in hac legum humanarum interpretatione hæc doctrinalis interpretatio magnum habet autoritatis pondus. In quo varii gradus esse possunt; nam si in aliqujus legis intelligentia omnes interpretes conveniant, faciunt humanam certitudinem, et regulariter loquendo, etiam inducunt obligationem servandi legem, et utendi illa in praxi juxta talem interpretationem.”—*De Legibus*, lib. vi.

## CHAPTER VIII.

## RECAPITULATION OF SOURCES OF INTERNATIONAL LAW.

THE sources, then, from which International Jurisprudence is derived, are these:—

1. The Divine Law, in both its branches—namely: The principles of Eternal Justice implanted by God in all moral and social creatures, of which nations are the aggregate, and of which governments are the International Organs.

2. The Revealed Will of God, enforcing and extending these principles of Natural Justice.

3. Reason, which governs the application of these principles to particular cases, itself guided and fortified by a constant reference to analogous cases and to the written reason embodied in the text of the Roman Law, and in the works of Commentators thereupon.

4. The universal consent of Nations, both as expressed (1) by positive compact or treaty, and (2) as implied by usage, custom, and practice: such usage, custom, and practice being evidenced in various ways—by precedents recorded in History; by being embodied and recorded in Treaties; in public documents of States; in the Marine Ordinances of States; in the decisions of International Tribunals; in the Works of eminent writers upon International Jurisprudence.

LIX. It may be well to illustrate by an example the practical application of the principles of International Law derived from the sources which have been enumerated in the preceding pages.

In 1839, the Emperor of China seized the opium of certain British merchants at Canton. Reparation was demanded by Great Britain, and on the refusal of it, war

followed between the two countries. Peace being made, and the reparation promised, a question arose, Whether, according to the principles of International Law, the measure of compensation which one government ought to demand of another for the forcible seizure of the property of its subjects was the *cost price* of the property, or its *market price* at the place of seizure?

This curious and important question between a Christian and civilized Heathen nation might have been impartially answered by a reference to the principles of the Roman Law, and to the commentaries of foreign jurists, aided by the analogy derived from similar cases adjudicated upon between subject and subject, both in England and other countries. The decision which these authorities pronounced would have furnished no unfair measure of the redress due from the Chinese Government to the subjects of Great Britain.

The claims of the British Government on behalf of her merchant subjects might have been supported by the following arguments: First, the obligations which the Chinese Government would have incurred if they had simply constituted themselves the purchasers of the opium, and deferred the payment till the period of the treaty; and, Secondly, the obligations which they incurred by the act of violence, and the character of wrong-doers with which that act clothed them.

As to the first point, then—that is to say, let the Chinese be considered simply as debtors, who had delayed the fulfilment of their contract till the price of the article had fallen in the market. Perhaps the portion of the Roman Law which, on account of its acknowledged wisdom and equity, is most generally incorporated into the municipal codes of Europe, is that which relates to obligations. One of the most celebrated expounders of this branch of Jurisprudence is *Pothier*. In the third article of the second chapter, and first part of his Treatise, he considers “des dommages et intérêts résultant, soit de l’inexécution des obligations, soit du retard apporté à leur exécution.” And he begins by defining his

subject thus: "On appelle *dommages et intérêts*, la perte " que quelqu'un a faite, et le gain qu'il a manqué de faire: " c'est la définition qu'en donne la loi (13 Ff. *Rat. rem hab.*)—" *Quantum mea interfuit, id est quantum mihi abest, quantumque lucrari potui.*" The result of his examination of this law is, that in all cases, even where the debtor is guilty of no bad faith, he shall be compelled to indemnify the creditor both for the actual loss which he has sustained, and for the gain which it may reasonably be supposed that he would have made, had he not been impeded by his engagement. In cases of bad faith, the rule is much more severe.

A particular kind of action was known to the Roman Law, in cases where the price or value of a thing in which one person was indebted to another was sought in lieu of the thing itself, payment of which had been delayed. The action was called, for an antiquated reason which need not be discussed, *Condictio triticaria* (a); and it is most learnedly treated by *J. Voet*, who says, it is necessary to consider, first, whether the value of the thing is the principal object of the suit, or whether the thing itself be the principal object, and the value only the necessary substitute, under the circumstances. If it be the value of the thing, if the price was to be paid in money, the law, he says, is clear,—the sum due is to be measured by the value of the article at the time when the obligation was first contracted, not at the time when the payment was enforced (b). If the thing itself be the principal object of the suit, its value should be estimated, either by that which it was worth at the time of beginning the suit (*litis contestatio*), or at the time the sentence was pronounced (*condemnationis tempus*); provided always that *no delay has been caused by the party against whom the suit is brought*,

(a) *Dig. de Condic. Tritic. xiii. iii. 1.*

(b) "Neque aliam contrahentes videri possunt æstimationem adeoque quantitatem pecuniariam respexisse, quam quæ fuit eo tempore, quo primitus obligatio nascebatur, sive bonæ fidei sive stricti juris negotium sit"—*Voet, ad Pand. l. xiii. tit. iii.*

because then “*dubium non est, quin frustratio moratori, et non alteri obesse debeat; ac propterea, si inter moram et litem contestatam remve judicatam res pluris valuerit, quam ipso litis contestatæ vel condemnationis momento, reus in id, quanti res plurimi fuit, a tempore moræ ad tempus litis contestatæ, in stricti juris, aut rei judicatæ in bonæ fidei judiciis, damnandus foret.*”

There can be no doubt that the Chinese Government was the “*Morator*” in this case, or that, according to the maxim of jurisprudence which has been cited, it ought to have been condemned in the costs of the opium *at the time* it became possessed of that article, unless, between that period and the period of restitution, the opium had become of greater value; for the only doubt raised by *Voet* is, whether in cases of *bona fides*, the augmented price should be due.

Again, from the time of the seizure, the Chinese Government became the *Emptor*; and whatever depreciation of price happened in the interim betwixt that time and the treaty, enured to the detriment of the purchasers, no maxim being clearer than “*periculum rei venditæ ad emptorem statim pertinet*” (c).

Again, let the Chinese Government be considered, not as the actual purchasers, but as securities for the payment of the money, and let the question be tried by the principle of Commercial, which is *quasi*-International Jurisprudence. What is the value in which the insurer is bound to indemnify the insured—that of the goods at the time of their loss, or that of their invoice price? *Emérigon*, no light authority, is clear upon this point. He says (d), adopting the language of other writers: “*En fait de prêt à la grosse et d’assurance, on ne fait point attention à la valeur des effets au temps de leur perte; mais seulement à ce qu’ils valaient au temps de leur chargement.*” So the English law adopts the original value of the goods as the basis of the calculation of the

(c) *Vide passim, Dig. lib. xviii. tit. vi.; Cod. lib. iv. tit. xlviii.*

(d) *Tom. i. p. 262.*



amount in which the *partial* loss of the insured is to be indemnified by the insurer (e).

Secondly, as to the obligations which the Chinese Government incurred by its act of violence, and by the character of a wrong-doer with which it thereby clothed itself; and if the language and spirit of Roman Jurisprudence was in favour of the claim of the opium owners against the Chinese Government, considered as simple debtors, or as securities for debtors, infinitely more was it in their favour against that Government treated as wrong-doers.

And, first, as to the Civil Law, which throughout that large chapter, “De obligationibus quæ ex delicto nascuntur,” teems with analogies, and those of great force and directly bearing upon this subject.

When a party, wrongfully deprived, was reinstated in his property by the well-known decree of the Prætor, the “restitutio in integrum”—the law said, “Sive quid amiserit sive lucratus non sit, restitutio facienda est, etiamsi non ex bonis quid amissum sit;” and in cases of theft, where the sentence restored with heavy damages the stolen property, it also provided for the value of the property where it could not be so restored—“æstimatione relata in id tempus quo furtum factum est” (f).

So by the “Lex Aquilia,” where there had been “damnum injuria datum,” in consequence of which the thing had diminished in value, the measure of restitution was “quanti ea res in anno plurimi fuit tantum domino dare damnetur” (g); and again it is said, “placet ad id tempus spectandum quo res unquam plurimi fuit” (h).

So Pothier, in the chapter already cited, after stating the mitigating circumstances attaching to transactions of *bona fides*, observes (i): “Les principes que nous avons établis

(e) *Loughorn v. Allnutt*, 4 *Taunton's Reports*, 511.

(f) *Dig. de Furtis*, xlvii. t. ii. 51.

*Inst.* iv. t. iii. *De Lege Aquilia*.

(g) *Dig. lib. ix. tit. ii. 23*.

(h) *Dig. lib. xiii. tit. i. 8. 1. De Condictione Furtiva*.

(i) *Lib. i. p. 72*.

“ jusqu'à présent n'ont pas lieu lorsque c'est le dol de mon  
 “ débiteur qui a donné lieu à mes dommages et intérêts. En  
 “ ce cas le débiteur est tenu indistinctement de tous les  
 “ dommages et intérêts que j'ai soufferts, auxquels son dol a  
 “ donné lieu, non-seulement de ceux que j'ai soufferts par  
 “ rapport à la chose qui a fait l'objet du contrat, *propter rem*  
 “ *ipsam*, mais de tous les dommages et intérêts que j'ai soufferts  
 “ par rapport à mes autres biens, sans qu'il y ait lieu  
 “ de distinguer et de discuter en ce cas, si le débiteur doit  
 “ être censé s'y être soumis; car celui qui commet un dol  
 “ s'oblige, *velit, nolit*, à la réparation de tout le tort que ce  
 “ dol causera.”

Grotius (*j*), in that chapter of his work which treats “ De  
 “ damno injuria dato, et de obligationibus quæ ex delicto  
 “ nascuntur,” fully adopts these maxims of the civil law.

To the same effect are the instances cited by Sir John  
 Davis (*k*), in a very curious case, called “ Le case de mixt  
 “ moneys.” In that case the English Privy Council (*l*), as-  
 sisted by the Judges, seem to have said, that if a man, upon  
 marriage, receives 1,000*l.* as a portion with his wife, paid in  
 silver money, and the marriage is dissolved *causa precontractus*,  
 so that the portion is to be restored, it must be  
 restored in equal good silver money, though the State shall  
 have depreciated the currency in the meantime (*m*); so if a  
 man recover 100*l.* damages, and he levies that in good silver  
 money, and that judgment is afterwards reversed, by which  
 the party is put to restore back all he has received, the  
 judgment creditor cannot liberate himself by merely re-  
 storing 100*l.* in the debased currency of the time, but he  
 must give the very same currency that he had received.

To the same, or even to a stronger effect, were the decisions  
 of Lord Stowell (*n*) in restoring captured vessels which had

(*j*) *De J. B. et P.* lib. ii. c. xvii.

(*k*) *Sir John Davis's Reports*, p. 27.

(*l*) 2 *Knapp, Privy Council Rep.* p. 20.

(*m*) *Conf. Burke, Thoughts on the French Revolution*, v. 277.

(*n*) *The Lucy*, 3. *C. Rob. Adm. Rep.* p. 208.

been condemned *by illegally* constituted Courts in the West Indies. The ship and cargo were directed to be restored *in value*; and on reference being made to the registrar and merchants, they took the *invoice prices* as the *measure* of the value, allowing upon it ten per cent. profit. Nor was this a solitary case; it was, as the Queen's advocate of that day said, "A question in which a great number of cases, and very "considerable amount of property, were involved" (o).

Lastly, there was in favour of this position the elaborate judgment of Sir William Grant, in the case of *Pilkington v. The Commissioners for Claims on France* (p). The circumstances of that case were, that the Revolutionary Government had confiscated the debts owing from the subjects of France to those of Great Britain. By the Treaty of 1814 compensation was to be made to the latter. Between the decree of confiscation and the repeal of it, the *assignats* in which the debts were to be paid had been depreciated in value: it was disputed whether or no the depreciation should be charged to the French. Sir William Grant, after touching upon the curious question of depreciated currency as affecting the relations of debtor and creditor, observes: "I have said it is "unnecessary to consider whether the conclusion drawn by "Vinnius or the decision in Davis's Reports be the correct "one, for we think this has no analogy to the case of "creditor and debtor. *There is a wrong act done by the "French Government; then they are to undo that wrong act, "and to put the party into the same situation as if they never "had done it.* It is assumed to be a wrong act, not only "in the Treaty, but in the repealing decree. They justify it "only with reference to that which, as to this country, has a "false foundation—namely, on the ground of what other "Governments had done towards them, they having confiscated the property of French subjects; therefore they say, "we thought ourselves justified at the time in retaliating

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(o) *The Lucy*, 3 C. Rob. Adm. Rep. p. 210.

(p) 2 Knapp, Privy Council Rep. p. 19.

“upon the subjects of this country. That being destitute of  
 “foundation as to this country, the Republic themselves, in  
 “effect, confess that no such decree ought to have been  
 “made, as it affected the subjects of this country; therefore  
 “it is *not merely* the case of a debtor paying a debt at the  
 “day it falls due, but it is *the case of a wrong-doer who*  
 “*must undo, and completely undo, the wrongful act he has*  
 “*done*; and if he has received the assignats at the value of  
 “50*d.*, he does not make compensation by returning an  
 “assignat which is only worth 20*d.*—*he must make up the*  
 “*difference between the value of the assignat at different*  
 “*periods \* \* \* \**. If the act is to be undone, it must be  
 “completely undone, and the party is to be restored to the  
 “situation in which he was at the time the act to be undone  
 “took place.”

If in the case of the British merchants and the Chinese Government, the Treaty had not specified the sum of six millions for the compensation, but merely promised in general terms to restore the value of the opium seized—then the principles of International Law which govern the construction of Treaties (*q*) would have entitled the original possessors of the opium to demand the *most* favourable interpretation which could be put upon the term “value” (*r*).

The conclusion then to which we are led with respect to the case which has been discussed, from the application of the principles of International Law, derived from all the sources which have been enumerated, is this: That the British Government would have been justified by the Law of Nations in demanding the *cost* price of the opium from the Chinese Government, even if the depreciation in value of that article at the time of the conclusion of the Treaty had been the result of the usual fluctuations of commerce. It is obvious that this conclusion applied with increased force to a case where the diminished value was one of the consequences of the wrongful acts of that Government itself.

(*q*) *Grotius*, lib. ii. c. xiv.

(*r*) *Vattel*, t. ii. p. 33.

## CHAPTER IX.

OBJECTION THAT THERE IS NO LAW BECAUSE NO  
SUPERIOR.

LX. It is sometimes said that there can be no Law between Nations because they acknowledge no common superior authority, no International Executive capable of enforcing the precepts of International Law. This objection admits of various answers: First, it is a matter of fact that States and Nations recognize the existence and independence of each other; and out of a recognized society of Nations, as out of a society of individuals, Law must necessarily spring. The common rules of right approved by Nations as regulating their intercourse are of themselves, as has been shown, such a Law. Secondly, the contrary position confounds two distinct things; namely, the physical sanction which Law derives from being enforced by superior power, and the moral sanction conferred on it by the fundamental principle of Right; the error is similar in kind to that which has led Jurists to divide moral obligations into Perfect and Imperfect. All moral obligations are equally perfect, though the means of compelling their performance is, humanly speaking, more or less perfect, as they more or less fall under the cognizance of human laws (a). In like manner, International

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(a) *Kant, Rechtslehre*, s. 54 seq.—*Warnkönig* says, with much force and truth, “Nonne ex mutua inter sese invicem agnitione inter eas quædam constituitur societas, et probantur communes justi regulæ quæ verum jus efficiunt? miscet vir summus (i. e. *Kant*) juris sanctionem cum justi notione, eaque in re parum sibi constans esse videtur.”—*Doctrina Juris Philosophica*, s. 147.

*Brown's Philosophy of the Human Mind*, vol. iv. pp. 396-7-8.

Justice would not be the less deserving of that appellation, if the sanctions of it were wholly incapable of being enforced.

How far and by what means they are capable of being executed are questions which have been already alluded to, and which will be more fully discussed in a subsequent portion of this work, when the International Process of enforcing the execution of International Justice by Negotiation, Treaties, Reprisals, or War comes under consideration.

But, irrespectively of any such means of enforcement, the Law must remain (b). God has willed the Society of States as He has willed the society of individuals. The dictates of the conscience of both may be violated on earth: but to the national, as to the individual conscience, the language of a profound philosopher is applicable: "Had it strength as it had right, had it power as it has manifest authority, it would absolutely govern the world" (c).

(b) *Kaltenborn, Kritik des Völkerrechts*, has a very good chapter on this head, entitled, *Die Lügner des Völkerrechts*, Kap. vi. p. 306: "Mit Recht nennt Stein es einen kalten und trostlosen Satz, dass es kein Völkerrecht geben solle."—"Stahl (Rechtsphilosophie) erklärt, nicht alles Recht sei erzwingbar, unter Anderen nicht das Völkerrecht. Wenn man aber nur richtiger und allgemeiner Weise die Erzwingbarkeit als äussere Realisirbarkeit auffasst, so ist auch das Völkerrecht erzwingbar zu nennen"—pp. 307, 309, n.

(c) *Bishop Butler (Sermon III.) On Human Nature*.

"Si les loix naturelles ont assez de force pour régner sur les Rois mêmes par la crainte de l'Auteur de ces loix, elles ne règnent pas moins entre les Rois qu'entre les différentes nations comparées les unes avec les autres. Elles sont le seul appui ordinaire de ce droit qui mérite proprement le nom de *Droit des Gens*; c'est-à-dire, de celui qui a lieu de Royaume à Royaume ou d'Etat à Etat."—*Institution du Droit public*, xii. t. i. 498; *Œuvres d'Aguessau*.

"The capability of being enforced by compulsory means is not the only or the most essential characteristic of Law. That characteristic lies much more in this—that it is the rule and order governing all human communities in all spheres and dimensions of private and public life, and also of the social relations of Peoples and States with one another, which is also International Law. Compulsion only issues from the community as such. This is the order which ought to be upholden—the life regulated by law is the common life of States.'—*Translated from Kaltenborn*, 310. Cited in "Discours prononcé par

Thirdly, most, if not all, civilized countries have incorporated into their own Municipal Law a recognition of the principles of International Law.

The United States of North America, almost contemporaneously with the assertion of their independence (*d*), and the new Empire of Brazil, in 1820, proclaimed their national adherence to International Law: in England it has always been considered as a part of the law of the land (*e*).

Lastly, it may be observed on this head, that the History of the World, and especially of modern times, has been but incuriously and unprofitably read by him, who has not perceived the certain *nemesis* which overtakes the transgressors of International Justice; for, to take but one instance, what an "Iliad of woes" (*f*) did the precedent of the first partition of Poland open to the kingdoms who participated in that grievous infraction of International Law! The Roman Law nobly expresses a great moral truth in the maxim—"Jurisjurandi contempta religio satis Deum habet ultorem" (*g*). The commentary of a wise and learned French jurist upon these words is remarkable, and may not inaptly close this first part of the work: "Paroles (he says) qu'on peut appliquer également à toute infraction des loix naturelles. La justice de l'Auteur de ces loix n'est pas moins armée contre ceux qui les transgressent, que contre les violateurs du serment, qui n'ajoute rien à l'obligation de les observer, ni à la force de nos engagements, et qui ne sert qu'à nous rappeler le souvenir de cette justice inexorable" (*h*).

M. Franck au Collège de France dans la séance d'ouverture de son Cours de Droit, de Nature et des Gens."—*Journal des Débats*, Dec. 24, 1872.

(*d*) "According to the general usages of Europe."—*Kent, Comm.* i. p. 1. See an article in the *North American Review*, for July–Aug. 1878, by the Hon. W. B. Lawrence.

(*e*) *Blackstone's Commentaries on the Laws of England*, book iv. c. v.

(*f*) *Burke, Letters on a Regicidal Peace*.

(*g*) *Cod. lib. iv. t. i. 2, De Reb. Cred. et de Jurejurando* (*Alexander Severus*).

(*h*) *D'Aguessseau, Ib. xiv. t. i. p. 500. See, too, p. 482,*

## PART THE SECOND.

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### CHAPTER I.

#### SUBJECTS OF INTERNATIONAL LAW—STATES.

LXI. STATES are the proper, primary, and immediate subjects of International Law. It will be seen, indeed, that questions of this jurisprudence may be raised in matters affecting the persons and property both of Private Individuals and of Sovereigns and Ambassadors—the Representatives of States—and of public officers like Consuls, but mediately and indirectly, and in so far only, as they are members, or representatives, or public officers of States. Under the appellation of State are included all the possessions of a Nation; so that if a Nation establish a Colony, however distant, that is looked upon by the eye of the Law as a part of the State, in the same manner as a province or city belonging to her ancient territory; and therefore, unless by the policy of the Mother State, or by the provisions of Treaty, a different character has been impressed upon the Colony, the Law applicable generally to the territory of the State is applicable to the Colony or Colonies belonging to her: all together make up one State, and are to be treated as one by International Law (a).

LXII. The question as to the origin of States belongs rather to the province of Political Philosophy than of Inter-

(a) *Vattel*, lib. i. c. xviii. s. 210: "Tout ce qui est dit du territoire d'une nation, doit s'entendre aussi de ses colonies."



national Jurisprudence. The idea that any descendant of Adam ever existed in what has been falsely called a state of nature, that is, out of the society of his fellow-men, has been long ago demonstrated to be equally inconsistent with reason and experience. The occasions, however, which led to the first formation of the particular society, of which each man is a member, may be of various kinds. That society may have been created by the division of a great empire into several kingdoms, whether by force of arms or by mutual consent: thus the empires of Alexander, of Charlemagne, and of Charles V. were distributed, among their successors, into separate kingdoms. It may have been founded by an accidental concourse of individuals abandoning another country, according to the classical legend of Antenor (*b*) and the story of the fugitives from the oppression of Attila, to which Venice (*c*) was said to owe her origin, or it may have been formed by the separation of a province from the community of which it was formerly an integral part, and by its establishment as an independent nation (*d*). In all the foregoing ways, “*novus populus sui juris nascitur*” (*e*). The last instance will be

(*b*) “Antenor potuit, mediis elapsus Achivis,  
Illyricos penetrare sinus, atque intima tutus  
Regna Liburnorum et fontem superare Timavi:  
\* \* \* \* \*

Hic tamen ille urbem Patavi, sedesque locavit  
Teucrorum, et *genti* nomen dedit, armaque fixit  
Troia.”—

*Æn.* i. 242–249.

(*c*) Gibbon, *Decline and Fall of the Roman Empire*, vol. vi. c. xxxv. pp. 119–121.

(*d*) Vattel, liv. i. c. xviii. s. 206; Rutherford, b. ii. c. ii. s. 5, p. 1259; Klüber, pt. i. c. i.; Wheaton's *Elements*, vol. i. p. 91.

(*e*) Grotius, *de J. B. et P.* lib. ii. c. x. p. 327.

“Concilia cœtusque hominum *jure sociati* quæ *civitates* appellantur.”—Cicero, *Somn. Scip.* iii.

“Quid est enim *civitas* nisi *juris societas*?”—*De Rep.* lib. i. 32.

“Est igitur, inquit Africanus, *res publica* *res populi*, *populus* autem non omnis *hominum cœtus*, quoquo modo congregatus, sed *cœtus multitudinis juris consensu et utilitatis communione sociatus*.”—*Ib.* lib. i. 25.

“Consociatio *juris* atque *imperii*.”—Grotius, *de J. B. et P.* lib. ii. c. ix. s. 8, p. 326.

more particularly considered in another part of this work, when the doctrine of Recognition comes under discussion.

LXIII. But for all purposes of International Law, a State (*ἡμος*, *civitas*, *Volk*) may be defined to be, a people permanently occupying a fixed territory (*certam sedem*), bound together by common laws, habits, and customs into one body politic, exercising, through the medium of an organized Government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all International relations with the other communities of the globe. It is a sound general principle, and one to be laid down at the threshold of the science of which we are treating, that International Law has no concern with the form, character, or power of the constitution or government (*f*) of a State, with the religion of its inhabitants, the extent of its domain, or the importance of its position and influence in the commonwealth of nations. "Russia and Geneva have equal rights" (*g*): "Une petite République n'est pas moins un Etat souverain que

Ὁ ὄχλος (ἐστὶ) πλῆθος ἀόριστον, πλῆθος συγκεχυμένον, πλῆθος ἀσύνακτον—οὐ γὰρ οἶον ὁ χορὸς, οὐδὲ οἶον ὁ δῆμος· ὁ μὲν γὰρ δῆμος ἐστὶ πλῆθος συνδεόμενον, ὁ δὲ ὄχλος διεσπασμένον.—*Plato, Proclus in Alcib.* lib. xviii.

Ὡς περ γὰρ οὐδὲ ἐκ τοῦ τυχόντος πλῆθους πόλις γίγνεται.—*Arist. Polit.* v. 3, 10.

"Facultas ergo moralis civitatem gubernandi, quæ potestatis civilis vocabulo nuncupari solet a Thucydide, tribus rebus describitur, cum civitatem, quæ vere civitas sit, vocat αὐτόνομον, αὐτόδικον, αὐτοτελῆ (lib. v. 18), suis utentem legibus, judiciis, magistratibus."—*Grotius, de J. B. et P.* lib. i. c. iii. s. vi.

*Grotius* observes (lib. ii. c. xviii. s. 2) most truly, "Qui autem externi habendi sint, ita clare exposuit Virgilius ut nemo jurisconsultorum possit clarius:

'Omnem equidem sceptris terram quæ libera nostris  
Dissidet, externam reor.'—*Æn.* vii. 369, 370.

(*f*) *Vattel*, liv. i. c. i. s. 4: "Toute nation qui se gouverne elle-même, sous quelque forme que ce soit, sans dépendance d'aucun étranger, est un Etat souverain." The words "sans dépendance" are, it will be seen, too lax.

(*g*) *Judgment of Chief Justice Marshall*, in the case of *The Antelope*, 10 *Wheaton's Reports*, p. 66; *Wheaton's History of the Modern Law of Nations*, p. 637.

"le plus puissant royaume" (*h*). Provided that the State possess a Government capable of securing at home the observance of rightful relations with other States, the demands of International Law are satisfied.

LXIV. If the foregoing definition be considered in detail, it will be found to exclude from the legal category of a State the following aggregates of individuals: (1.) All hordes or bands of men recently associated together, newly arrived at or occupying any previously uninhabited tract or country, though it may be possible that such horde or band may, in course of time, change its character, and ripen into a body politic, and have a claim to be recognized as such. "Est autem civitas," Grotius says (*i*), "cœtus perfectus liberorum hominum, juris fruendi et communis utilitatis causa sociatus;" and in another place, defining the character of sovereignty, "Summa autem illa dicitur (*i.e.* potestas civilis) cujus actus alterius juri non subsunt, ita ut alterius voluntatis humanæ arbitrio irriti possint reddi . . . . summæ potestatis subjectum commune est civitas quam perfectum cœtum esse supra diximus" (*j*). (2.) All migratory hordes not occupying a fixed or certain seat, and all associations of men united for the accomplishment of immoral ends (*sceleris causa*), such as piratical hordes, although they may have a fixed abode, and call themselves by the name of States. The Malay and Sooloo pirates of Borneo and the Eastern Archipelago furnish an example of such societies (*k*). "Populus autem," Cicero says, in a definition copied by most jurists, "non omnis hominum cœtus, quoquo modo congregatus, sed cœtus multitudinis juris

(*h*) *Vattel*, *Prélim.* s. 18, *Egalité des Nations*; and s. 19, "Par une suite nécessaire de cette égalité, ce qui est permis à une nation l'est aussi à toute autre, et ce qui n'est pas permis à l'une, n'est pas non plus à l'autre."

(*i*) *De J. B. et P.* lib. i. c. i. s. 14.

(*j*) *Ib.* c. iii. s. 7.

(*k*) *Serhassen Pirates*, 2 *W. Rob. Adm. Rep.* pp. 354-358; *The Illeanon Pirates*, *Queen v. Belcher*, 6 *Moore Privy Council Rep.* pp. 471-484.

"*consensu et utilitatis communione sociatus*" (l); and in another place, "*Neque esset unum vinculum juris, nec consensus ac societas cœtus, quod est populus*" (m).

LXV. With respect to societies united *sceleris causa*, the philosophers and jurists of antiquity are in perfect accordance with those of modern times. All agree to class such bodies amongst those of whose corporate existence the law takes no cognizance (*qui civitatem non faciunt*), and therefore as not entitled to International Rights either in peace or war. The question has generally been raised in time of war as to when a State should be considered a legitimate enemy (*hostis*), and when as a lawless freebooter (*pirata, latro*) (n). It is not, however, because a nation commits a piratical act, or is guilty of the violation of International Rights, that it is to be considered as wholly without the pale of a State. The ancient Greeks, we learn from Homer and Thucydides, practised rapine and piracy, and considered these exploits rather glorious than shameful. The Normans, the original discoverers of America, who swept the seas with their victorious galleys, and subverted and founded kingdoms by the prowess of their individual subjects, dealt, it is said, with the ships which they encountered upon the high seas as their legitimate prey (o). The ancient Greeks and Normans, however, were not pirates in the legal sense of the term.

(l) *De Rep.* lib. i. 25.

(m) *De Rep.* lib. iii. 31.

(n) *Grotius, de J. B. et P.* lib. iii. c. iii. ss. 1, 2: "Distinctio populi, quamvis injuste agentis, a piratis et latronibus."

(o) *Thucyd.* i. 5: Οἱ γὰρ Ἕλληνες τὸ πάλαι . . . ἐτρέποντο πρὸς ληστείαν . . . καὶ ἥρπαζον . . . οὐκ ἔχοντές ποω αἰσχύνῃν τούτου τοῦ ἔργου, φέροντες δὲ τι καὶ δόξης μᾶλλον. *Arist. Pol.* v. 2, 3; *Hom. Od.* iii. 73; ix. 252; *Herod.* ii. 152; iii. 39, 47; *Thucyd.* vi. 4; *Apollod.* i. 9, 18; *Liv.* v. 28: "Haud procul freto Siculo a piratis Liparensium excepti, devehuntur Liparas. Mos erat civitatis, velut publico latrocinio partam prædam dividere."

Lord Clarendon's account of the Privateers of Ostend, by whom he was taken prisoner, puts them pretty much upon the same level as the classical Freebooters. See *Clarendon's Life* (8vo. ed.), p. 208: "All the ships, though they had the King of Spain's commission, were freebooters, belonging to private owners, who observed no rules or laws of nations." See, too, p. 212.

Their society was formed for civil and moral objects, not for plunder; and their acts of violence sprang from a confusion, incident to a barbarous age, as to the principles of right and wrong, and the laws of war and peace.

Pompey was allowed the honour of a triumph for his victory over the Illyrians, who certainly exercised indiscriminate hostilities against the ships of all countries, but they were considered a "*gens*," and as having "*justum imperium*." He did not receive the same distinction for his destruction of the pirates who infested the Mediterranean: "*Tantum discrimen*," Grotius observes (*p*), "*est inter populum quantumvis sceleratum, et inter eos, qui, cum populus non sint, sceleris causa coeunt*."

In the time of Charles the Second of England, Molloy wrote as follows: "Pirates that have reduced themselves into a Government or State, as those of *Algiers*, *Salley*, *Tripoli*, *Tunis*, and the like, some do conceive ought not to obtain the rights and solemnities of war, as other towns or places; for though they acknowledge the supremacy of the *Porte*, yet all the power of it cannot impose on them more than their own wills voluntarily consent to." He there mentions that Louis IX. treated them as a nest of wasps (*q*), and unworthy of the rights of civilized war; "notwithstanding," he adds, "this, *Tunis* and *Tripoli*, and their sister *Algiers*, do at this day (though nests of pirates) obtain the rights of legation: so that now (though indeed pirates), yet having acquired the reputation of a Government, they cannot properly be esteemed pirates, but enemies" (*r*). Bynkershoek (*s*), some years afterwards, expressed yet more strongly the same opinion. And in the

(*p*) Lib. iii. c. iii. s. 2.

(*q*) "Bugia et Algieri, infami nidi di corsari."—*Tasso*.

(*r*) *Molloy*, s. 4, p. 33.

(*s*) "Quod autem *Albericus Gentilis* (*Advoc. Hispan.* l. i. c. xv.) aliquos eos, qui *Barbari* in Africa vocantur, jure piratarum censent, et eorum occupatione dominium mutari negant, nulla ratione defendi potest—*Algerienses*, *Tripolitani*, *Tunitani*, *Zaleenses* piratæ non sunt, sed civitates, quæ certam sedem atque ibi imperium habent, et quibuscum nunc pax

year 1801, Lord Stowell fully adopted this position, and asserted that the African States had long ago acquired the character of established Governments, with whom we have regular treaties acknowledging and confirming to them the relations of legal communities (*t*); and he remarked that, although their notions of International justice differ from those which we entertain, we do not on that account venture to call in question their public acts—that is to say, that although they are perhaps on some points entitled to a relaxed application of the principles of International Law, derived exclusively from European custom, they are nevertheless treated as having the rights and duties of States by the civilized world (*u*).

est nunc bellum, non secus ac cum aliis gentibus, quique propterea ceterorum principum jure esse videntur.”—*Bynkershoek, Quæst. J. P.* b. i. c. 17.

(*t*) *The Helena*, 4 C. Rob. Adm. Rep. p. 5. *Life of Sir Leoline Jenkins*, vol. ii. p. 794.

(*u*) It is well known that, for some time, the lawfulness of any dealings, much more any treaty, between the Christian and the Turk was denied. *Albericus Gentilis* discusses (*De Jure Belli*, lib. iii. c. xix.), “Si foedus recte contrahitur cum diversæ religionis hominibus, quæstio partim theologica, partim civilis.” He treats it, however, for the most part, theologically, and arrives at the conclusions that commerce is lawful between Christian and Heathen States, but not in alliance against another Heathen State; and, *a fortiori*, not against another Christian State. Nevertheless, in a former chapter he had said, with a liberality scarcely known to the age in which he lived, “Religionis jus hominibus cum hominibus propriè non est: itaque nec jus læditur hominum ob diversam religionem; itaque, nec bellum causa religionis. Religio erga Deum est; jus est divinum, id est, inter Deum et hominem; non est jus humanum, id est, inter hominem et hominem: nihil igitur quæritat homo violatam sibi ob aliam religionem.”—Lib. i. c. ix. See Inaugural Lecture on *Albericus Gentilis*, by Professor Holland at Oxford, 1874.

*Grotius, de J. B. et P.* lib. ii. c. xv. 8–12: “De foederibus frequens est quæstio, licetene ineantur cum his qui a vera religione alieni sunt: quæ res in jure naturæ dubitationem non habet; nam id jus ita omnibus hominibus commune est, ut religionis discrimen non admittat. Sed de jure divino quæritur.”

Lord Coke said there were four kinds of Leagues: 1st, *Fœdus Pacis*; 2nd, *Fœdus Congratulationis*; 3rd, *Fœdus Commutationis Mercium*.

These observations were always applicable in some degree to the relations of the Ottoman Porte itself with other Governments. The Ottoman Empire extends, whether in Asia, Africa, or Europe, over a vast variety of distinct nations and separate races. Hardly have those separate races which profess the Mahometan religion coalesced into one nation. But the Christian, whether of the Greek or the Roman Catholic Faith, has never entirely lost those distinctions of origin, manners, institutions, and, above all, of religion, which eternally separate him from the Turk. These distinctions have always been and must always be indelible. The Mahometan and the Christian may live under the same government (*x*), but they will remain distinct nations. The two streams are immiscible in their character, and will never "flow the same."

It is unnecessary to consider the relations of the Algerine State with Europe. The gallant exploit of Lord Exmouth in 1815, and the bombardment of Algiers, compelled the Dey not only to set free his slaves and to abolish all Christian slavery, but also to promise a compliance with the usages of civilized States (*y*). Nevertheless, Algerine piracy was not entirely suppressed till 1830–1838, when the French took possession of Algiers and a portion of the adjoining territory. It is unnecessary to consider whether, in these circumstances, this act was entirely justifiable, whether a conquest of the territory was the only or right means of avenging an insult (*z*). The conquest has, I think, been of service to Christendom, and generally to the civilized world. It should be observed, however, that, in spite of the remonstrance of England, no attention whatever was paid by France to the

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These three might exist between a Christian and an Infidel State, but the 4th, *Fœdus Mutui Auxilii*, could not.—4th Inst. p. 155.

*Ward's Law of Nations*, ii. 321 (*Of Treaties with Powers not Christian*).

(*x*) See Lord Stowell's Judgment in *The Indian Chief*, 3 C. Rob. Adm. Rep. p. 20.

(*y*) *Ann. Reg.* 1816, p. 97.

(*z*) *Ann. Reg.* 1830, p. 238.

rights and interests of the Porte as Suzerain of the Dey (*a*). The subsequent incorporation of all the Algerine territory in 1841–1847 was another act of conquest which the necessity of maintaining the former conquest was alleged to justify (*b*).

For some time after the conquest of Constantinople (1453) grave doubts were entertained by the nations of Christendom as to the lawfulness of any pacific intercourse with the Sultan. It was not till after the Treaty of Constantinople in 1720, that the Russian minister was permitted to *reside* at Constantinople; and direct relations between Roman Catholic Sovereigns and the Porte can scarcely be said to have an earlier date than the end of the eighteenth century (*c*). Even after the lapse of nearly four centuries, at the Congress

(*a*) M. Guizot is silent on this point, and I cannot agree with the proposition which precedes his historical reference to the fact of the capture of Algiers. The doctrine of national instincts of aggrandisement is, *pace tanti viri*, most unsound, and has been very mischievous to France.

(*b*) “L’immobilité extérieure n’est pas toujours la condition obligée des États, de grands intérêts nationaux peuvent conseiller et autoriser la guerre; c’est une honnête erreur, mais une erreur de croire que, pour être juste, toute guerre doit être purement défensive; il y a eu et il y aura, entre les États divers, des conflits naturels et des changements territoriaux légitimes; les instincts d’agrandissement et de gloire ne sont pas, en tout cas, interdits aux nations et à leurs chefs. Quand le roi Charles X, en 1830, déclara la guerre au dey d’Alger, ce n’était point là, de notre part, une guerre défensive, et pourtant celle-là était légitime; outre l’affront que nous avions à venger, nous donnions enfin satisfaction à un grand et légitime intérêt, français et européen, en délivrant la Méditerranée des pirates qui l’infestaient depuis des siècles.”—Guizot, *Mémoires pour servir à l’Histoire de mon Temps*, tome iv. pp. 9, 10.

The same author writes (tome vii. ch. xli. pp. 125–6): “Quant à la nécessité de soumettre complètement les Arabes et d’établir la domination française dans toute l’étendue de l’Algérie, j’étais de l’avis du général Bugeaud; la question n’était plus, comme de 1830 à 1838, entre l’occupation restreinte et l’occupation étendue; la situation de la France dans le nord de l’Afrique avait changé; les faits s’étaient développés et avaient amené leurs conséquences; la conquête effective de toute l’Algérie était devenue la condition de notre établissement à Alger et sur la côte.”

(*c*) 2 *Militärz.*, *Manuel des Consuls*, p. 1571.



of Vienna, 1815, the Ottoman Empire was not represented, nor was it included in the provisions of positive public law contained in the Treaty which was the result of the Congress. Nevertheless, the International intercourse between the Sultan and other Powers was then, and had been for a long time, upon a much stricter footing of legality, than had subsisted between those Powers and the African or Barbary States.

Long before the Treaty of Vienna (1815) the Crescent had ceased to be an object of terror to Christendom; and a principle of International Policy with respect to the Ottoman Power, directly the reverse of that which had formerly prevailed, had taken root in Europe—namely, the principle that the preservation and independence of the Ottoman Power was necessary for the safety of European Communities (*d*).

LXVI. The Treaties affecting the relations of Russia with the Porte are the following:—

Adrianople . . . . .	1681
Carlowitz . . . . .	1699
Constantinople . . . . .	1700
Constantinople . . . . .	1709
Peace of Pruth . . . . .	1711
Constantinople . . . . .	1712
Adrianople . . . . .	1713
Constantinople . . . . .	1720
(By this treaty a Russian Minister was permitted to <i>reside</i> at Constantinople.)	
<i>Belgrade</i> . . . . .	1730
<i>Kaynardgi</i> . . . . .	1774
Explained . . . . .	1779
Constantinople . . . . .	1783-4
Szistowe, Gallacz, Jassy . . . . .	1790-1-2
Constantinople . . . . .	1809
Bucharest . . . . .	1812
Ackerman . . . . .	1826
<i>Adrianople</i> . . . . .	1829
<i>Unkiar Skelessi</i> . . . . .	1833
London . . . . .	1840
Dardanelles . . . . .	1841

(*d*) The question of the religious Protectorate claimed by Christian Powers with respect to the Christian subjects of the Sultan, both in Europe and Asia, will be discussed hereafter.

*Vide ante*, ch. vi. TREATIES.

Balta Liman . . . . .	1846
Balta Liman . . . . .	1849
The Treaty of San Stefano as modified by Treaty of Berlin . . . . .	1878
The definitive Treaty of February . . . . .	1879

LXVII. But the general Treaties between the Ottoman Porte and the European States appear to be best arranged as follows :—

1. From the conquest of Constantinople to the Treaty of Carlowitz, 1699.
2. From the Treaty of Carlowitz, 1699, to the Treaty of Belgrade, 1739.
3. From the Treaty of Belgrade, 1739, to the Treaty of Bucharest, 1812.
4. From the Treaty of Bucharest, 1812, to the Treaty of the Dardanelles in 1841.
5. From the Treaty of the Dardanelles, 1841, to the Treaty of Paris in 1856.
6. The Treaty of Paris, 1856.
7. From the Treaty of Paris, 1856, to the Treaty of London, 1871.
8. From the Treaty of London, 1871, to the Treaty of Berlin, 1878.

LXVIII. By the Treaty of Vienna in 1731 Great Britain made common cause with Austria against every enemy but the Turk (*e*).

The Peace of Szistowe (1791), between Austria and the Porte, and the Peace of Jassy (1792), between Russia and the Porte, were concluded under the mediation of the triple alliance of Great Britain, Prussia, and Holland.

In 1798, when Napoleon invaded Egypt, Russia and the Porte concluded an alliance confirming the Treaty of Jassy, and mutually guaranteeing the integrity of their dominions. To this Treaty Great Britain acceded in 1799 : it expired in 1806, and was renewed in 1809 by the Treaty of Constantinople, by the eleventh article of which Great Britain acknowledged that the strait of the Dardanelles was *mare clausum* under the dominion of the Porte.

The Treaty of Bucharest, in 1812, put an end to the hostilities which had raged between Russia and the Porte since 1809. This Treaty greatly advanced the boundary of Russia.

It contained stipulations confirming those of former Treaties in favour of the national privileges of Moldavia and Wallachia, and it contained some conditions in favour of the Christian Servians, which, in 1813, were violated with circumstances of great barbarity; but the Servians applied in vain to the Congress of Vienna for mediation or succour.

In 1819 the Porte recognized the Protectorate of Great Britain over the Ionian Islands (*f*).

In 1828 the Great Powers interfered with the Porte on

(*f*) The subsequent surrender of this Protectorate in 1863 is considered in the next chapter. *Martens, Nouv. Rec. de Traités*, xiii. (5 Supp.) 386. The Treaty containing this recognition sets forth the titles of the Sultan, and the style of the Porte's negotiations with Christian States:—  
 “Nous, par la grâce du souverain maître des empires et du fondateur immuable de l'édifice solide du califat, par l'influence merveilleuse du modèle des saints, du soleil des deux mondes, notre grand prophète Mahomet Mustapha, ainsi que par la coopération de ses disciples et successeurs, et de toute la suite des saints, sultan, fils de sultan, empereur, fils d'empereur, Mahmoud-Han, vainqueur, fils d'Ahmed-Han, vainqueur, dont les nobles diplômes sont décorés du titre souverain de sultan des deux hémisphères; dont les ordonnances portent le nom éclatant d'empereur des deux mers, et dont les devoirs attachés à notre dignité impériale consistent dans l'administration de la justice, les soins d'un bon gouvernement, et l'assurance de la tranquillité de nos peuples; seigneur et gardien des plus nobles villes du monde, vers lesquelles se dirigent les vœux de tous les peuples, des deux saintes villes de la Mecque et de Médine, du sanctuaire intérieur du pays saint; calife suprême des contrées et provinces situées dans l'Anatolie et la Romélie, sur la mer Noire et sur la mer Blanche, dans l'Arabie et la Chaldée; enfin, glorieux souverain de nombreuses forteresses, châteaux, places et villes, nous déclarons:—

“Que, vu la parfaite union et l'éternelle amitié qui règnent entre notre Sublime Porte, d'éternelle durée, et le plus glorieux de tous les grands princes qui croient en Jésus-Christ, le modèle de tous les personnages d'un rang élevé de la nation du Messie, le médiateur des intérêts politiques des peuples, revêtu des ornemens de la majesté et de la gloire, et couvert des marques de la grandeur et de la célébrité, sa Majesté notre très-estimable, ancien, intime, sincère, et constant ami, le roi (padischah) des royaumes unis d'Angleterre, d'Ecosse, et d'Irlande, et d'une grande partie des pays qui en dépendent, George III (dont la fin puisse être heureuse!),

“L'une et l'autre cour ont le désir et l'intention la plus sincère d'affermir les bases de leur amitié, et de resserrer de plus en plus les liens de la bonne intelligence et de l'intimité qui les unit.”

behalf of the Greeks, whose independence they established after the battle of Navarino.

In 1829 the Treaty of Adrianople was concluded between Russia and the Porte, by which the power of the former was much increased, especially with regard to the mouths of the Danube, in a manner scarcely consistent with the Public Law of Europe (*g*). In 1833, the Treaty of Unkiar Skelessi was concluded between Russia and the Porte, the avowed object of which was to protect the Porte against the rebellion of the Pacha of Egypt. The *casus fœderis* contemplated by this Treaty having arisen, the other European Powers interposed, on the double ground of protecting the Porte against Egypt, and of preventing the protectorate of the Porte from being exclusively vested in and exercised by Russia.

A Convention between all the European Powers, except France, took place in London, July 15, 1840, for the pacification of the East, to which the Porte also was a party. The maintenance of the integrity and independence of the Ottoman Empire as a security for the Peace of Europe was the avowed principle of this Convention.

The language of the preamble of the Treaty is as follows :

“ In the name of the most merciful God.

“ His Highness the Sultan having addressed himself to  
 “ their Majesties the Queen of the United Kingdom of Great  
 “ Britain and Ireland, the Emperor of Austria, King of  
 “ Hungary and Bohemia, the King of Prussia, and the  
 “ Emperor of All the Russias, to ask their support and assist-  
 “ ance in the difficulties in which he finds himself placed by  
 “ reason of the hostile proceedings of Mehemet Ali, Pacha  
 “ of Egypt;—difficulties which threaten with danger the  
 “ integrity of the Ottoman Empire, and the independence of  
 “ the Sultan’s throne; their said Majesties, moved by the  
 “ sincere friendship which subsists between them and the  
 “ Sultan; animated by the desire of maintaining the integrity  
 “ and independence of the Ottoman Empire as a security for

“ the peace of Europe ; faithful to the engagement which they  
 “ contracted by the collective note presented to the Porte by  
 “ their representatives at Constantinople, on the 27th of  
 “ July, 1839 : and desirous, moreover, to prevent the effusion  
 “ of blood, which would be occasioned by a continuance of  
 “ the hostilities which have recently broken out in Syria  
 “ between the authorities of the Pacha of Egypt and the  
 “ subjects of the Sultan ; their said Majesties and his  
 “ Highness the Sultan have resolved, for the aforesaid pur-  
 “ poses, to conclude together a Convention ” (h).

By the Treaty of the Dardanelles (July 10th, 1841) the five great European Powers admitted the exclusive authority of the Porte over these straits, and incorporated this principle of Law into the written Law (*jus pacticium*) of Europe (i). This principle has been preserved by the recent Treaty of Berlin, 1878.

The Treaty of Paris, 1856 (as has been mentioned in a former chapter), placed the independence and integrity of the Ottoman Empire under the guarantee of England, Austria, and France. But Russia in 1871 practically set at nought the Treaty of Paris, which was, however, in some degree patched up and restored by the Treaty of London, 1871 ; the Protocol to which stated, that the Powers recognised “ that it is an essential principle of the Law of  
 “ Nations that none of them can liberate itself from the  
 “ engagements of a Treaty, nor modify the stipulations  
 “ thereof, unless with the consent of the contracting parties  
 “ by means of an amicable understanding.”

Some of these Treaties, and the events which led to them, will be noticed more at length hereafter. But it is clear, even from this cursory notice, that the Porte must now be considered as subject, with only such exceptions as the reason of the thing may dictate, not only to the principles of general International Law, but to the particular provisions

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(h) *Hertslet's Treaties*, vol. v. p. 544.

(i) *Wheaton's Hist.* 289, 555-585.

of the European Code (*k*). The *Hatti-Sherif* of 1856 relative to the Hierarchy of the Greek Church and non-Muslim subjects generally, will be considered hereafter (*l*). The peculiar relations which subsist between the Porte and Egypt will be considered in the next chapter.

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(*k*) *Speech of the Earl of Clarendon (Secretary of State for Foreign Affairs)*, in the House of Lords, April 1853, on the interference of the Continental Powers in the relations subsisting between the Porte and Montenegro. See also the Debates in both Houses of Parliament upon the subject of Russian intervention in Turkey on the ground of an alleged Religious Protectorate of the Greek Church.—*Hansard's Parl. Deb.* 1853; *Koch*, iv. 349. *Vide post*, chapter on "Intervention." I say this *non obstante* the opinion expressed by M. Guizot, *Mém.* vi. ch. xxxvii. pp. 257-8.

(*l*) *Ann. Reg.* 1856; *State Papers*, 337. *Vide post*, "Intervention on Religious Grounds," §. cccix.

## CHAPTER II.

## DIFFERENT KINDS OF STATES.

LXIX. HAVING considered the general attributes and characteristics required by International Law for the constitution of a State, it becomes necessary to apply these tests to the different forms of States which are found to exist, in order to fix the position of each in the Commonwealth of Nations. This part of the subject appears to admit of the following principal division :—

First. One or more States under One Sovereign.

Secondly. Several States under a Federal Union.

LXX. I.—As to one or more States under one Sovereign. It is proposed to consider this first branch of the principal division under the following heads :—

1. Single States, under one Sovereign.

2. Several States perpetually united (*reuli unione*) under one Sovereign.

3. The peculiar case of Poland.

4. Several States temporarily united under one Sovereign (*personali unione*).

5. A State under the Protectorate of another, or of others, but retaining its International personality.

6. A State under such Protectorate so as to have forfeited its International personality.—The Ionian Islands.

7. The European Free Towns or Republics.

8. The peculiar case of Belgium.

9. The peculiar case of Greece.

10. States standing in a Feudal relation to other States.—The Turkish Provinces.

11. The peculiar case of Egypt.

LXXI. First.—With respect to a Single State, under One Sovereign, like Spain or Portugal as at present constituted, no doubt can be raised as to such a State being the proper subject of International Law.

LXXII. Secondly.—Where several States, perpetually under one Sovereign (*reali unione*), have retained certain (*a*) rights and privileges as far as their International Relations are concerned, but have lost all separate and distinct existence as far as their External Relations are concerned, they are not, properly and strictly speaking, subjects of International Law—at least, they can only be so mediately and indirectly, and not directly and immediately. For instance, a State which entered into any negotiations with Hungary or Ireland as independent States (even while they possessed a separate legislature) would have been guilty of a gross violation of International Law towards Austria or Great Britain.

LXXIII. Thirdly.—The particular State of Poland requires a distinct and separate consideration. The various partitions of that unhappy country are not now under discussion; it is with the condition of Poland under the Treaty of Vienna, and the Russian manifesto of 1832, that we are at present concerned. The union established between Russia and Poland by the Congress of Vienna was of a wholly anomalous kind. By the first act of that Congress the Duchy of Warsaw, with the exception of certain districts, was united to the Russian Empire, and was irrevocably bound by its constitution to belong to the Emperor of Russia, and his heirs in all

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(*a*) *Grotius, de J. B. et P.* lib. i. c. iii. s. 21; lib. ii. c. ix. s. 9:—  
 ‘Quod si quando uniantur duo populi non amittentur jura sed communicabuntur. . . . Idemque censendum est de regnis quæ non fœdere, aut eo duntaxat quod regem communem habeant, sed vera unitate junguntur.’

*Vattel*, I. liv. i. c. i.

*Oppenheim, System des Völkerrechts*, zweiter Theil, Kap. vi. s. 4.

*Wheaton, Eléments du Droit international*, p. 20.

*Klüber, Europäisches Völkerrecht* (ed. 1851), erster Theil, Kap. i. s. 27.

*Heffter, Europ. Völkerrecht*, s. 20.



perpetuity. The Emperor undertook to confer on this State, which was to be under a separate and distinct government, such powers of internal administration as he might think fit. The Emperor was to take the title of King of Poland. The Poles, whether subjects of Austria, Prussia, or Russia, were to obtain representative institutions, regulated according to the manner which might seem expedient to the respective Governments. In conformity with these stipulations, the Emperor Alexander granted a constitutional charter to the Kingdom of Poland, November 15 (27), 1815. This charter declared that *The Kingdom of Poland* was united to Russia by its constitution—that the sovereign authority in Poland was to be exercised in conformity therewith—that the coronation of the King of Poland was to take place in the Polish capital, where he was bound to take an oath to observe the charter. Poland was to have a perpetual representation, composed of the King and the two chambers forming the Diet, in which body the power of legislation and taxation was to be vested. A distinct Polish army, coinage, military orders, were to be preserved in the kingdom. But in 1832, the Emperor Nicholas established what was called an *organic statute* for Poland, the principal features of which were, that the Kingdom of Poland was henceforth to be perpetually united to, and form an integral part of, the Russian Empire, the Polish Diet was to be abolished; the Polish army absorbed into the Russian; and the administration of Poland carried on under a Russian Council of State, called the Section for the Offices of Poland. The Governments of England and France protested against this act as a violation of the spirit, if not of the letter, of the Treaty of Vienna (b). It seems, however, impossible at the present time to consider Poland as retaining any of those characteristics which would entitle it to be considered as an independent

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(b) *Annuaire historique*, 1832. *Documenta historica*, p. 184. *Wheaton's History*, 433, 441. *Wheaton, Elém. du Droit Inter.* i. pp. 53–55. *Hansard's Parliamentary Debates*, vol. xiii. p. 1115.

kingdom, according to the principles of International Law (c).

LXXIV. Fourthly.—In the cases which have been mentioned the several States are *really* and *perpetually* (*unione reali*) united under one Sovereign; but there may be cases in which the union is of a *personal* character (*unio personalis*), depending upon the continuance of a certain dynasty (d).

Hanover and Great Britain, while under the same crown, Prussia and Neuchâtel in Switzerland, at the time when Vattel wrote, afforded examples of this kind (e). Norway and Sweden, since the Treaty of Vienna, have presented a similar instance. In these cases the individuality of the State as to her external relations remains in abeyance, and is not lost, though it be merged in the union; and therefore, emerging

(c) In 1865 this question was again brought before the English Parliament. Lord Palmerston, then Prime Minister, admitted that Russia had not executed faithfully her Treaty engagements to Poland, said that diplomatic action had been tried in vain, that war was inexpedient, and with respect to the proposal that the payment of the annual sum on account of the Russo-Dutch loan should be suspended, observed, "That engagement having no reference whatever to Poland, to say that, because Russia had misconducted herself in Poland, and broken her engagement under the Treaty of June 1815, we were therefore to break our engagements founded on a different treaty, and relating to a different transaction, was a lame and impotent conclusion. Any such course the House and the Government should be ashamed even to contemplate adopting, as it would be equally unworthy of Parliament and unbecoming to the country."—*Ann. Reg.* 1865, p. 70.

See also vol. ii. s. xc. &c. of these Commentaries.

(d) "Rursum accidit, ut plurium populorum idem sit caput, qui tamen populi singuli perfectum cœtum constituunt; neque enim ut in naturali corpore non potest caput unum esse plurium corporum, ita in morali quoque corpore; nam ibi eadem persona, diversa ratione considerata, caput potest esse plurium ac distinctorum corporum. Cujus rei certum indicium esse potest, quod extincta domo regnatrice imperium ad quemque populum seorsim revertitur."—*Grot. de J. B. et P.* lib. i. c. iii. s. 7, § 2.

(e) The King of Prussia by Treaty (1857) renounced his right of sovereignty in the Principality of Neuchâtel and the Comté of Valengin. Neuchâtel became a member of the Helvetic Confederation.—*Ann. Reg.* 1857, pp. 232-437.

when that union is dissolved, she is entitled to the rank and consideration of an independent kingdom.

LXXV. Fifthly.—A State may place itself under the protection of another State with or without losing its International existence. It may well be, as Grotius, translating Appian, says, “*Sub patrocínio non sub ditione*” (*f*); or, according to his own expression in another part of his work, it may be “*Cum imminutione imperii*,” or “*Sine imminutione imperii*” (*g*).

The proper and strict test to apply will be the capacity of the protected State to negotiate, to make peace or war with other States, irrespectively of the will of its protector. If it retain that capacity, whatever may be the influence of the protector, the protected State must be considered as an independent member of the European commonwealth.

It must, however, retain this capacity *de facto* as well as *de jure* (*h*); and it is necessary to make this observation, because, at no distant period of history, an attempt was made to evade the application of this principle of law, by retaining theoretically the name when the substance was practically and notoriously lost. The Swiss Cantons and the States forming the Confederation of the Rhine, to say nothing of other countries, were nominally free and independent when their armies were under French officers, their cabinets under French ministers, and their whole constitution entirely subject and subservient to their French ruler and protector Napoleon. They were, therefore, justly considered by International Law as provinces of France, and were denied the rights of independent States during the continuance of this state of

(*f*) Lib. i. c. iii. s. 21, § 3.

(*g*) Lib. ii. c. xv. s. 7, § 1.

(*h*) “Interim verum est accidere plerumque, ut qui superior est in fœdere, si is potentia multum antecellat, paulatim imperium proprie dictum usurpet: præsertim si fœdus perpetuum sit, et cum jure præsidia inducendi in oppida, &c. . . . Hæc cum fiunt, et ita fiunt *ut potentia in jus transeat*, qua de re alibi erit disputandi locus, tunc aut qui socii fuerant fiunt subditi, aut certe partitio fit summi imperii, qualem accidere posse supra diximus.”—Grotius, lib. i. c. iii. s. 21, pp. 126, 127.

subserviency. It was on this ground that the capture of the Danish fleet, in 1806, by Great Britain was justified—namely, that it was *de facto* a fleet in the power and under the orders of France.

On the other hand (i), while this capacity remains, no mere inequality of alliance is destructive of the personality (*persona standi*) of a State among nations. The parties to such alliance are not the less sovereign because they have consented of their own accord to disadvantageous terms in their Treaties with other nations; it belongs, as Grotius says, to unequal alliances, “*Ut potentiori plus honoris, infirmiori plus auxilii deferatur*” (j); or because they rely upon the arm of those nations for succour and defence when attacked: “*Si ergo populus tali fœdere obligatus liber manet, si alterius potestati subjectus non est, sequitur ut summum imperium retineat. Atque idem de rege pronunciandum, est enim populi liberi, et regis qui vere rex sit, eadem ratio*” (k).

(i) “*Proculus, Libro Epistolarum viii. Non dubito, quin fœderati et liberi nobis externi non sint, neque inter nos atque eos postliminium sit; etenim quid inter nos atque eos postliminio opus est, quum et illi apud nos et libertatem suam, et dominium rerum suarum æque atque apud se retineant, et eadem nobis apud eos contingant?*” Sec. 1. “*Liber autem populus est is, qui nullius alterius populi potestati est subjectus, sive qui fœderatus est, item sive æquo fœdere in amicitiam venit, sive fœdere comprehensum est, ut is populus alterius populi majestatem comiter conservaret; hoc enim adjicitur, ut intelligatur, alterum non esse liberum; et quemadmodum clientes nostros intelligimus liberos esse, etiam si neque auctoritate, neque dignitate, neque jure omni nobis pares sunt, sic eos, qui majestatem nostram comiter conservare debent, liberos esse intelligendum est.*”—*Dig. xlix. tit. xv.*

*De Captivis et de Postliminio, &c. Grotius incorporates this reasoning into International Law.—De J. B. et P. lib. i. c. iii. 21, 22.*

See the reason of the exception in the case of the *Santa Anna*, *Edwards Adm. Rep.* 181.

(j) *Grotius, ubi supra.*

(k) *Grotius, ubi supra.*

*Adherbal's Speech to the Roman Senate* describes a protected kingdom in these words: “*P. O. Micipsa pater meus moriens mihi præcepit, uti regni Numidiæ tantummodo procurationem existimarem meam; ceterum jus et imperium penes nos esse: simul eniterer domi militisæque quam*

LXXVI. Sixthly.—States which cannot stand this test, which cannot negotiate, nor declare peace or war with other countries without the consent of their protector, are only mediately and in a subordinate degree considered as subjects of International Law (*l*). In war they share the fortunes of their protectors (*m*); but they are for certain purposes, and under certain limitations, dealt with as independent moral persons, especially in questions of Comity, touching the persons and property of their own subjects in a foreign country, or of strangers in their own territory, and with respect to other matters of the like kind.

States of this description are sometimes, but with admitted impropriety of expression, called semi-sovereign (*demi-souverain—halbsouverän*). Such appears to have been the lordship of Kniphausen, in North Germany, which exercised independent jurisdiction over the inhabitants of a territory enjoying maritime traffic and a (*n*) flag of its own, under the protection of the German Confederation and the *Suzeraineté* (*Hoheit, Oberhoheit*) of Oldenburg (*o*). Such is or was the Republic of Poglizza (*p*), in Dalmatia, under the protection of Austria. Such were the provinces Moldavia and Wallachia (*q*), and the hereditary Principality of Servia, under the *Suzeraineté* of Turkey. The present international *status* of these provinces will be considered hereafter. The former *status* of Montenegro is more doubtful. The little State of

*maximo usui esse populo Romano. Vos mihi cognatorum, vos in locum affinium ducere: si ea fecissem, in vestra amicitia exercitum, divitias, munimenta regni me habiturum.*"—*Sallust, Bellum Jugurth.* 14.

(*l*) Though *Grotius* (c. xxi. p. 118) would seem to think otherwise; but *Barbeyrac's* note (vol. i. 161, 25) supports the view in the text.

(*m*) *Vattel*, l. xvi.; *Wolff*, c. iv. 437–439.

(*n*) Under this ancient German Empire, there were a variety of petty Principalities exercising a territorial supremacy (*Landeshoheit*), but, nevertheless, subject to the legislative and judicial authority of the Emperor and the Empire. These were absorbed in the German Confederation, except *Kniphausen*.

(*o*) *Heffters, das Europäische Völkerrecht*, 1. Buch, xxxviii. s. 19.

(*p*) *Martens, Droit des Gens*, liv. i. c. ii. s. 20.

(*q*) *Wheaton, Elém. de Dr. Int.* i. 49.

Monaco, from 1641 till the Revolution, was under the Protectorate of France; under which it was replaced by the Treaty of Paris in 1814; and, by a Treaty in 1815, it was transferred to the Protectorate of Sardinia. In 1860 Nice was given up by Italy to France, and in the next year the greater part of Monaco was ceded to that country, the remaining fragment being placed under its protection.

LXXVII. The Ionian Islands, placed by the Treaty of Paris under the Protection of Great Britain, are cited by Klüber as a perfect specimen of a semi-sovereign State (*r*); and therefore their constitution, although existing no longer, is given here:

By a Convention between Great Britain and Austria, and Russia and Prussia, signed at Paris, November 5, 1815, it is provided that—

“I. The Islands of Corfu, Cephalonia, Zante, Santa Maura, Ithaca, Cerigo, and Paxo, with their dependencies, such as they are described in the Treaty between his Majesty the Emperor of All the Russias and the Ottoman Porte, of March 21, 1800, shall form a *single, free, and independent State*, under the denomination of the United States of the Ionian Islands.

“II. This State shall be placed under the *immediate and exclusive protection* of his Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors. The other contracting Powers do consequently renounce every right or particular pretension which they might have formed in respect to them, and formally guarantee all the dispositions of the present Treaty.

“III. The United States of the Ionian Islands shall, with the approbation of the protecting Power, regulate their internal organization; and, in order to give to all the parts of this organization the necessary consistency and action, his

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(*r*) “Einen wahren halbsouveränen Staat bilden, seit 1815, die Vereinigten Staaten der Ionischen Inseln wegen der Schutz- und Souveränitäts-Rechte, welche Grossbritannien über sie auszuüben hat.” — *Klüber*, § 33.

“ Britannic Majesty will employ a particular solicitude with  
“ regard to the legislation and the general administration of  
“ those States. His Majesty will therefore appoint a Lord  
“ High Commissioner to reside there, invested with all the  
“ necessary power and authorities for this purpose.

“ IV. In order to carry into execution without delay the  
“ stipulations mentioned in the articles preceding, and to  
“ ground the political re-organization of the United Ionian  
“ States upon that organization which is actually in force, the  
“ Lord High Commissioner of the protecting Power shall  
“ regulate the forms of convocation of a legislative assembly,  
“ of which he shall direct the proceedings, in order to draw  
“ up a new Constitutional Charter for the States, which his  
“ Majesty the King of the United Kingdom of Great Britain  
“ and Ireland shall be requested to ratify.

“ Until such Constitutional Charter shall have been so  
“ drawn up and duly ratified, the existing Constitutions shall  
“ remain in force in the different Islands, and no alteration  
“ shall be made in them, except by his Britannic Majesty  
“ in Council.

“ V. In order to ensure, without restriction, to the in-  
“ habitants of the United States of the Ionian Islands the  
“ advantages resulting from the high protection under which  
“ these States are placed, as well as for the exercise of the  
“ rights inherent in the said protection, his Britannic Majesty  
“ shall have the right to occupy the fortresses and places of  
“ those States, and to maintain garrisons in the same. The  
“ military force of the said United States shall also be under  
“ the orders of the Commander-in-Chief of the troops of his  
“ Britannic Majesty.

“ VI. His Britannic Majesty consents that a particular  
“ Convention with the Government of the said United States  
“ shall regulate, according to the revenues of those States,  
“ everything which may relate to the maintenance of the  
“ fortresses already existing, as well as to the subsistence and  
“ payment of the British garrisons, and to the number of men  
“ of which they shall be composed in time of peace.

“The same Convention shall likewise fix the relations which are to exist between the said armed force and the Ionian Government.

“VII. The trading flag of the United States of the Ionian Islands shall be acknowledged by all the contracting Parties as *the flag of a free and independent State*. It shall carry with the colours, and above the armorial bearings thereon displayed before the year 1807, such other as his Britannic Majesty may think proper to grant, as *a mark of the protection* under which the said United Ionian States are placed ; and for the more effectual furtherance of this protection, all the ports and harbours of the said States are hereby declared to be, with respect to honorary and military rights, within British jurisdiction. The commerce between the United Ionian States and the dominions of his Imperial and Royal Apostolic Majesty shall enjoy the same advantages and facilities as that of Great Britain with the said United States. None but *commercial agents*, or *Consuls*, charged solely with the carrying on commercial relations, and subject to the regulations to which commercial agents or Consuls are subject in other independent States, shall be accredited to the United States of the Ionian Islands” (s).

By the Constitutional Charter of the United States of the Ionian Islands, as agreed on and passed unanimously by the Legislative Assembly on May 2, 1817, it is provided as follows (s. 4) as to their *Foreign Relations* :—

“I. Whereas, in the latter part of the seventh article of the Treaty of Paris, it is agreed, ‘ That no person, from any Power whatsoever, shall be admitted within these States, possessing or pretending to possess any powers beyond those which are defined in the aforesaid article ;’ it is hereby declared, that any person who shall assume to himself any authority as an agent for a foreign Power, except as therein directed, shall be amenable to be tried before the Supreme



“ Council of Justice, and be liable, if found guilty, to punishment, as in cases of high treason against the State.

“ II. No native, or subject, of the United States of the Ionian Islands shall be held competent to act as Consul or Vice-Consul for any foreign Power within the same.

“ III. The British Consuls, in all ports whatsoever, shall be considered to be the Consuls and Vice-Consuls of the United States of the Ionian Islands, and the subjects of the same shall be entitled to their fullest protection.

“ IV. All applications necessary to be made by these States to any foreign Power shall be transmitted by the Senate to his Excellency the Lord High Commissioner of the protecting Sovereign, who shall forward the same to the Ambassador or Minister of the protecting Sovereign, resident at the court of the said foreign Power, for the purpose of submitting them in due form to the said Power.

“ V. The approval of the appointments of all foreign agents or Consuls in the United States of the Ionian Islands shall be by the Senate, through the medium of his Highness the President thereof, with the concurrence of his Excellency the Lord High Commissioner of the protecting Sovereign.

“ VI. With a view to ensure the most perfect protection to the commerce of these Islands, every vessel, navigating under the Ionian flag, shall be bound, before leaving the port of the Ionian States to which she belongs, to provide herself with a pass, signed by his Excellency the Lord High Commissioner of the protecting Sovereign, and no vessel sailing without such pass shall be considered as navigating according to law. But it is reserved to his Majesty the protecting Sovereign to decide how far it may be necessary that, independent of such pass, they should further be bound to supply themselves with Mediterranean passes.”

The sixth section relates to the National Colours and Armorial Bearings :—

“ I. The National Commercial Flag of the United States

“ of the Ionian Islands, as directed by the seventh article of  
 “ the Treaty of Paris, shall be the original flag of the States,  
 “ with the addition of the British union, to be placed in the  
 “ upper corner next to the flagstaff.

“ II. On usual days the British colours shall be hoisted  
 “ on all the forts within the United States of the Ionian  
 “ Islands ; but a standard shall be made, to be hoisted on  
 “ days of public rejoicing and festivity, according to the  
 “ model of the armorial bearings of the said States.

“ III. The arms, or armorial bearings, of the United  
 “ States of the Ionian Islands shall hereafter consist of the  
 “ British arms in the centre, surrounded by the arms of  
 “ each of the Islands composing the said States.

“ IV. The armorial bearings of each of the Islands shall  
 “ consist of the individual arms of the Island, and such  
 “ emblem, denoting the sovereign protection, as may be  
 “ deemed advisable.”

In the seventh section are the following General Clauses:—

“ III. In the instance of all maritime transactions and  
 “ the collection of the customs, it shall be competent for  
 “ the proper authorities to employ either British or Ionian  
 “ subjects.”

“ V. A specific law shall settle the terms, time, and mode  
 “ for the *naturalization of foreign subjects* in the States ; but  
 “ *the subjects of the protecting Power* shall, in all instances,  
 “ be entitled to naturalization in half the time that is required  
 “ for those of any foreign Power ; and a subject of the pro-  
 “ tecting Power, or of any other Power, may be at once  
 “ naturalized by a Bill to that effect, without reference to  
 “ any fixed time of residence in these States, which shall be  
 “ laid down in the law itself” (t).

The Protectorate of Great Britain over the seven Ionian  
 Islands was ratified by the Porte in 1819 (u).

(t) Extracted from *Hertslet's Treaties*, vol. i. p. 53.

(u) *Martens, N. R. (Suppl.)* v. 387. Acte de Ratification de la Porte  
 Ottomane relativement à la cession des Iles Ioniennes à la Grande-Bre-  
 tagne, et de Parga à la Turquie, du 24 avril 1819.

During the last Russian war with England an Ionian vessel was seized by a British cruiser, and brought into the Prize Court, where her condemnation was asked for. It was not denied that she was destined to a belligerent or Russian port. The learned judge (Dr. Lushington) said,—

“The vessel proceeded against was an Ionian vessel, destined, for the purpose of the present inquiry, to Tarangos, a Russian port. The captors said that such a voyage by an Ionian ship subjected her to condemnation. The claimants said that neither by the law of nations, nor any other law, were they liable to condemnation; that the port of Tarangos was not blockaded; that they did not carry contraband; that the expedition in which they were engaged was lawful; and that they were entitled to restitution. He must now endeavour to set forth as clearly as he could the reasons and principles on which the prayers for condemnation and restitution were founded. The counsel for the captors alleged that all Ionian vessels were to be considered as British vessels; that, as British vessels were prohibited from trading with Russia during war, so, for the same reason, were Ionian vessels; in other words, that British and Ionian vessels were to be placed in the same category; that, as regarded a Power hostile to Great Britain, the Ionians stood in the same position as British subjects. If that proposition were true, it necessarily followed as a corollary from it that all trade with the enemy of Great Britain not allowed to British subjects was prohibited to the inhabitants of the Ionian Islands. There was no doubt that a British vessel could not trade with Tarangos; therefore if British and Ionian vessels were *in eadem conditione*, this vessel could not lawfully prosecute her enterprise and must be condemned. The claimants denied all those propositions. They said they were not British subjects, that they were not at war with Russia, and had a right to carry on with Russia any trade that the subjects of a neutral nation could be lawfully engaged in.”

The learned judge, after a careful examination of the facts and the law, concluded as follows:—

“Did the subjects of the Ionian States stand *in eadem conditione*? It was admitted on all hands they were not British subjects in the proper sense of the term. They did not participate with British subjects in the advantages of commercial intercourse in virtue of the treaty. Were they to suffer the inconveniences, and have none of the benefits? Did they owe any allegiance to the Crown of Great Britain which they violated by such trade? Perhaps that was the nicest and most difficult point. Allegiance, in the proper sense of the term, undoubtedly they did not owe. A limited obedience, according to the treaty, they did owe, as a sort of equivalent for protection. There might be cases in which it would be competent to Great Britain to declare that abstinence from trade with the enemy was due for such protection; but was it to be inferred without such declaration? He thought not. But, again, was that presumed illegality of trade a principle to be enforced beyond all precedent? On what ground was it to be based? Not of advantage to the Ionian Islands, which had no interest in the quarrel. Without a possibility of advantage to themselves, they might be deprived of a lucrative trade, and that, too, without any formal act done by the protecting Power. He had mentioned some of the reasons which had induced him to come to this conclusion; but there were others. He would restore, because the property was not the property of allies in war; for neither by the treaty nor by the law of nations could he impose upon the subjects of the Ionian States that character. He would restore, because if Great Britain had the right by treaty of declaring war between the Ionian States and Russia, she had not done so; because, in the absence of all such declaration or solemn act in whatever form, he was of opinion that the Ionian subjects were not placed in a state of war; because he held it to be the duty of every court professing to administer the law of nations to

“carry into effect and operation the plain terms of a treaty, though the consequences might not have been foreseen” (x).

This judgment was not appealed from. But the evil was remedied by taking the proper formal steps for prohibiting commerce between the Ionian Islands and Russia during the continuance of the war. This account of the peculiar *status* of these Islands while under the Protectorate of Great Britain, and the application of International Law to them, has seemed to me proper to be preserved in this work. But the recent cession of these Islands by Great Britain to the Kingdom of Greece has deprived the statement of the practical importance which formerly attached to it. In December 1862, after the abdication of King Otho, a memorandum from the British Government was delivered to the Provisional Government of Greece, in which were these passages:—

“It is her Majesty’s earnest desire to contribute to the welfare and prosperity of Greece.

“The Treaties of 1827 and 1832 bear evidence of this desire on the part of the British Crown.

“The Provisional Government of Greece declared, upon the withdrawal of King Otho from Greece, that their mission is to maintain for Greece constitutional monarchy, and the relations of peace with all other States.

“If the new assembly of the representatives of the Greek nation should prove faithful to this declaration, should maintain constitutional monarchy, and should refrain from all aggression against neighbouring States, and if they should choose a sovereign against whom no well-founded objection could be raised, her Majesty would see in this course of conduct a promise of future freedom and happiness for Greece. In such a case, her Majesty, with a view to strengthen the Greek Monarchy, would be ready to announce to the Senate and Representatives of the Ionian Islands her Majesty’s wish to see them united to the Monarchy of Greece, and to form with Greece one

(x) The “Ionian Ships,” Spinks’ Prize Cases, 1854–56, p. 193. See also 1 *Jur.* N.S. p. 549.

“united State; and if this wish should be expressed also  
“by the Ionian Legislature, her Majesty would then take  
“steps with the concurrence of the Powers who were  
“parties to the Treaty by which the seven Ionian Islands  
“and their dependencies were placed as a separate State  
“under the Protectorate of the British Crown.”

The offer of Great Britain was received with much joy and gratitude by the Ionians. Prince George of Denmark was elected King of Greece.

A conference as to the cession of the Ionian Islands was holden in London on June 26, 1863, at which the Plenipotentiaries of Great Britain, France, and Russia were present. A protocol was drawn up which declared,—

“(1) With regard to the guarantee of the political existence and of the frontiers of the Kingdom of Greece, the three Protecting Powers maintain simply the terms in which it is expressed by Article IV. of the Convention of May 7, 1832.

“It is agreed that the Ionian Islands shall be included in that guarantee, when their union to the Hellenic Kingdom shall have obtained the consent of the parties concerned.

“(2) With regard to the financial obligations which Greece has contracted towards the three Protecting Powers, on account of the loan, in virtue of Article XII. of the Convention of May 7, 1832, it is understood that the Courts of France, Great Britain, and Russia will in concert watch over the strict execution of the engagement proposed at Athens by the representatives of the three Powers, and accepted by the Greek Government, with the concurrence of the Chambers, in the month of June, 1860” (y).

The Lord High Commissioner dissolved the Ionian Parliament, “with a view to consult in the most formal and authentic manner the wishes of the inhabitants of the Ionian Islands as to their future destiny.”

The new Parliament unanimously resolved in favour of the union of the Ionian Islands with Greece. "A Treaty was concluded between her Majesty, the Emperor of Austria, the Emperor of the French, the King of Prussia, and the Emperor of Russia, which was signed at London on November 14, and by it her Majesty renounced the protectorate over 'the islands of Corfu, Cephalonia, Zante, Santa Maura, Ithaca, Cerigo, and Paro, with their dependencies.' It was also provided that the Ionian Islands, after their union to the Kingdom of Greece, 'shall enjoy the advantages of a perpetual neutrality; consequently no armed force, either naval or military, shall at any time be assembled or stationed upon the territory or in the water of those Islands, beyond the number that may be strictly necessary for the maintenance of public order, and to secure the collection of the public revenue. The high contracting parties engage to respect the principle of neutrality stipulated by the present article' " (z).

It was further provided that the fortifications of Corfu and its immediate dependencies should be demolished previously to the withdrawal of the British troops.

LXXVIII. In all the foregoing instances (excepting perhaps in the case of Servia), though they may exhibit a greater or a less derogation from the rights of independent Sovereignty, the attribute of free and uncontrolled agency in their external relations with foreign States is wanting.

LXXIX. Seventhly.—There are in Europe some few States which are Free Republics, to which Consuls are accredited, and which, strictly speaking, are capable of entering into treaties (a) with Foreign Powers.

(z) *Ann. Reg.* 1863, pp. 293-7.

(a) For example, see the Treaty, in 1841, between Mexico and these cities, entitled "*Traité d'Amitié, de Navigation et de Commerce, conclu entre la République du Mexique et les Villes anseatiques de Brême, Lubeck, et Hambourg; signé à Londres le 7 avril 1832, ratifié à Londres le 8 novembre 1841.*"—*De M. et de C.* v. 155.

Convention between the Hanscatic States and United States of North

Bremen, Hamburg, and Lübeck (*b*) were a few years ago, and still appear to be, Free cities of Germany—the only remains of that once formidable and celebrated Hanseatic League, the last general Diet of which was held at Lübeck in 1630. These three towns were Cities of the German Empire, and since 1814 had been admitted as members of the German Confederation, and had, in conjunction with Frankfort, a vote in the Diet. They now form part of the German Empire, but remain outside the limits of the Zollverein.

LXXX. *Frankfort-on-the-Main* (*c*) was the most important Free town of Germany, and, as has been mentioned, the seat of the German Diet. The constitution of this Free city was established in 1816. It consisted of a Senate in which the Executive Power is lodged, and a Legislative body chosen by electors of the city and suburbs. In 1866 it was forcibly seized by and absorbed into Prussia, and now forms part of the territory of that kingdom.

LXXXI. *Andorra* or *Andorre* is a small independent State in a valley in the Eastern Pyrenees between the French department of Ariège and Catalonia in Spain. It is considered as a neutral and independent Province, though to a certain extent connected both with France and Spain. This little Republic has preserved for a long series of years the institutions which it now enjoys.

America, London, Sept. 29, 1825.—*Elliot's American Diplomatic Code*, ii. 202.

Convention with the Porte, May 1839.—*Martens, Nouv. Rec.* ii. 183.

(*b*) *Miltitz, Manuel des Consuls*, l. i. c. iii. s. 9; l. ii. c. i. s. 3, Art. 6.

*Waltershausen*: "Urkundliche Geschichte des Ursprungs der Deutschen Hanse."—*Vide post*, § cxi.

(*c*) Treaties between Great Britain and Frankfort:—

Treaty, Commerce and Navigation, London, May 13, 1832.—*Hertslet's Treat.* vol. iv. 147, 153, 548.

*Ib.* Dec. 29, 1835.—*Ib.* vol. v. 97, 98, 625.

Convention, Commerce and Navigation, March 2, 1841.—*Ib.* vol. vi. 751, 755, 996.

Traité de Commerce et de Navigation entre la Grèce et les Villes anseatiques, mai 1843.—*Vide De M. et C.* 811.



LXXXII. *San Marino* is also a very small but independent Republic in the north-east of Italy, encircled by Provinces formerly belonging to the Pontifical States. It possesses an area of 21 miles, with a town of the same name. The military force of the Republic is said to consist of 950 men, and the whole population to be about 7,800. In 1739 Cardinal Alberoni subjected it to the Pope, who, however, restored the Republic. In 1797 it declined the offer of an increase of territory made to it by Napoleon, who appears to have scrupulously respected its neutrality.

LXXXIII. Eighthly.—The Constitution and Territory of BELGIUM have been also definitively established by Treaty (d), and are therefore matter of International Law. It will be seen that a perpetual neutrality, in questions arising between other Powers, is the most remarkable condition of the national existence of Belgium.

According to the Treaty of April 19, 1839 (superseding the original Treaty of November 15, 1831), the Belgian territory is composed of the provinces of *South Brabant, Liège, Namur, Hainault, West Flanders, East Flanders, Antwerp, and Limbourg*; such as they formed part of the United Kingdom of the Netherlands constituted in 1815, with the exception of certain districts of the province of Limbourg.

The Belgian territory, moreover, comprises a part of the Grand Duchy of Luxembourg.

By Article VII. of the Treaty, it is also provided that Belgium, within the limits specified in Arts. 1, 2, and 4, shall form an *independent and perpetually neutral State*. It shall be bound to observe such neutrality towards all other States.

The following Articles should be noticed :

“ 8. The drainage of the waters of the two Flanders shall  
“ be regulated between Holland and Belgium, according to  
“ the stipulations on this subject contained in Art. 6 of the

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(d) *Hertael's Treaties*, vol. v. pp. 26-31, 354.

“definitive Treaty, concluded between his Majesty the Emperor of Germany and the States General on the 8th of November, 1785; and in conformity with the said article, Commissioners, to be named on either side, shall make arrangements for the application of the provisions contained in it.

“9. The provisions of Arts. 108-117, inclusive of the General Act of the Congress of Vienna, relative to the free navigation of navigable rivers, shall be applied to those navigable rivers which separate the Belgian and the Dutch territories, or which traverse them both.

“So far as regards specially the navigation of the Scheldt, it shall be agreed that the pilotage and the buoing of its channel, as well as the conservation of the channels of the Scheldt below Antwerp, shall be subject to a joint superintendence; and that this joint superintendence shall be exercised by Commissioners, to be appointed for this purpose by the two parties. Moderate pilotage dues shall be fixed by mutual agreement, and those dues shall be the same for the vessels of all nations.”

In 1870, Great Britain entered into separate Treaties with France and Prussia, then at war, with respect to the neutrality of Belgium. The ratifications were exchanged in London on the 9th and on the 26th of August respectively. The following is the document, which is the same, *mutatis mutandis*, in both cases:—

“Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and his Majesty the Emperor of the French, being desirous at the present time of recording in a solemn act their fixed determination to maintain the independence and neutrality of Belgium, as provided by the 7th Article of the Treaty signed at London on April 19, 1839, between Belgium and the Netherlands, which Article was declared by the Quintuple Treaty of 1839 to be considered as having the same force and value as if textually inserted in the said Quintuple Treaty, their said Majesties have determined to conclude between themselves a separate

“treaty, which, without impairing or invalidating the conditions of the said Quintuple Treaty, shall be subsidiary and accessory to it; and they have accordingly named as their plenipotentiaries for that purpose, that is to say, &c.

“ARTICLE I. His Majesty the Emperor of the French having declared that, notwithstanding the hostilities in which France is now engaged with the North German Confederation and its allies, it is his fixed determination to respect the neutrality of Belgium so long as the same shall be respected by the North German Confederation and its allies, her Majesty the Queen of the United Kingdom of Great Britain and Ireland on her part declares that, if during the said hostilities the armies of the North German Confederation and its allies should violate that neutrality, she will be prepared to co-operate with his Imperial Majesty for the defence of the same in such manner as may be mutually agreed upon, employing for that purpose her naval and military forces to ensure its observance, and to maintain, in conjunction with his Imperial Majesty, then and thereafter, the independence and neutrality of Belgium.

“It is clearly understood that her Majesty the Queen of the United Kingdom of Great Britain and Ireland does not engage herself by this treaty to take part in any of the general operations of the war now carried on between France and the North German Confederation and its allies, beyond the limits of Belgium as defined in the Treaty between Belgium and the Netherlands of April 19, 1839.

“ARTICLE II. His Majesty the Emperor of the French agrees on his part, in the event provided for in the foregoing Article, to co-operate with her Majesty the Queen of the United Kingdom of Great Britain and Ireland, employing his naval and military forces for the purpose aforesaid; and, the case arising, to concert with her Majesty the measures which shall be taken, separately or in common, to secure the neutrality and independence of Belgium.

“ARTICLE III. This Treaty shall be binding on the  
 “high contracting parties during the continuance of the  
 “present war between France and the North German  
 “Confederation and its allies, and for twelve months after  
 “the ratification of any treaty of peace concluded between  
 “those parties; and on the expiration of that time the in-  
 “dependence and neutrality of Belgium will, so far as the  
 “high contracting parties are respectively concerned, con-  
 “tinue to rest, as heretofore, on the 1st Article of the  
 “Quintuple Treaty of April 19, 1839.

“Signed at London August 11, 1870.

“GRANVILLE.

“LA VALETTE”(e).

The Grand Duchy of Luxemburg is connected by a personal union with the Kingdom of the Netherlands, the King being Grand Duke. It was included in the Germanic Confederation from 1815 to 1866, and its capital, considered one of the strongest fortresses in Europe, was a Federal fortress. After 1866, considerable discussion arose as to the status of Luxemburg. The question was finally settled by the Treaty of London, of May 11, 1867, by which the Grand Duchy is declared neutral, and the capital has ceased to be a fortified place. It remains inside the Zollverein, but has no other connection with the German Empire (f).

LXXXIV. Ninthly.—The Constitution and Territory of GREECE are the subject of Treaty and guarantee, and under the protection of International Law. The Articles of the Treaty (signed in London May 7, 1832), which principally affect the International *Status* of Greece, are as follows :—

“1. The Courts of Great Britain, France, and Russia,  
 “duly authorised for this purpose by the Greek nation, offer

(e) See Debate in the House of Lords on this Treaty.

Treaty between Belgium and England for the mutual surrender of Fugitive Criminals. Brussels, May 20, 1876.

(f) *Vide post*, s. cccvii.

“ the hereditary Sovereignty of Greece to the Prince  
“ Frederick Otho of Bavaria, second son of his Majesty the  
“ King of Bavaria.

“ 2. His Majesty the King of Bavaria, acting in the name  
“ of his said son, a minor, accepts, on his behalf, the hereditary  
“ Sovereignty of Greece, on the conditions herein-after  
“ settled.

“ 3. The Prince Otho of Bavaria shall bear the title of  
“ King of Greece.

“ 4. Greece, under the Sovereignty of the Prince Otho of  
“ Bavaria, and under the guarantee of the three Courts, shall  
“ form a monarchical and independent State, according to the  
“ terms of the Protocol signed between the said Courts on  
“ February 3, 1830, and accepted both by Greece and by  
“ the Ottoman Porte.

“ 5. The limits of the Greek State shall be such as shall  
“ be definitively settled by the negotiations which the Courts  
“ of Great Britain, France, and Russia have recently opened  
“ with the Ottoman Porte, in execution of the Protocol of  
“ September 26, 1831.

“ 6. The three Courts having beforehand determined to  
“ convert the Protocol of February 3, 1830, into a defini-  
“ tive Treaty, as soon as the negotiations relative to the  
“ limits of Greece shall have terminated, and to communicate  
“ such Treaty to all the States with which they have rela-  
“ tions, it is hereby agreed, that they shall fulfil this engage-  
“ ment, and that his Majesty the King of Greece shall  
“ become a contracting party to the Treaty in question.

“ 7. The three Courts shall, from the present moment,  
“ use their influence to procure the recognition of the Prince  
“ Otho of Bavaria as King of Greece by all the Sovereigns  
“ and States with whom they have relations.

“ 8. The Royal Crown and dignity shall be hereditary in  
“ Greece; and shall pass to the direct and lawful descendants  
“ and heirs of the Prince Otho of Bavaria, in the order of  
“ primogeniture. In the event of the decease of the Prince  
“ Otho of Bavaria, without direct and lawful issue, the Crown

“of Greece shall pass to his younger brother, and to his direct  
 “and lawful descendants and heirs, in the order of primo-  
 “geniture. In the event of the decease of the last-mentioned  
 “Prince also, without direct and lawful issue, the Crown of  
 “Greece shall pass to his younger brother, and to his direct  
 “and lawful descendants and heirs, in the order of primogeni-  
 “ture. In no case shall the Crown of Greece and the Crown  
 “of Bavaria be united upon the same head.

“9. The majority of the Prince Otho of Bavaria, as King  
 “of Greece, is fixed at the period when he shall have com-  
 “pleted his twentieth year ; that is to say, on June 1, 1835.

“10. During the minority of the Prince Otho of Bavaria,  
 “King of Greece, his rights of Sovereignty shall be exercised  
 “in their full extent by a Regency composed of three Coun-  
 “cillors, who shall be appointed by his Majesty the King of  
 “Bavaria.

“11. The Prince Otho of Bavaria shall retain the full  
 “possession of his appanages in Bavaria. His Majesty the  
 “King of Bavaria, moreover, engages to assist, as far as may  
 “be in his power, the Prince Otho in his position in Greece,  
 “until a revenue shall have been set apart for the crown in  
 “that State ” (g).

The union of the Ionian Islands with Greece has been  
 already mentioned (h).

In the recent war between Russia and Turkey, Greece  
 was persuaded by the Great Powers to remain neutral,  
 for which she obtained a miserable compensation in the  
 following Provisions of the Treaty of Berlin :—

“ARTICLE XXIII. The Sublime Porte undertakes  
 “scrupulously to apply in the Island of Crete the Organic  
 “Law of 1868 (‘Règlement’), whilst introducing into it  
 “the modifications which may be considered equitable.

“Similar laws adapted to local necessities, excepting as  
 “regards the exemption from taxation granted to Crete,

(g) *Hertslet's Treaties*, vol. iv. pp. 320, 322.

(h) *Vide supra*, s. lxxvii.

“ shall also be introduced into the other parts of the Turkish Empire for which no special organization has been provided for by the present Treaty.

“ Special Commissions, in which the native element shall be largely represented, shall be charged by the Sublime Porte with the elaboration of the details of the new laws (‘ Règlements ’) in each province.

“ The schemes of organization resulting from these labours shall be submitted for examination to the Sublime Porte, which, before promulgating the Acts for putting them into force, shall take the advice of the European Commission instituted for Eastern Roumelia.

“ ARTICLE XXIV. In the event of the Sublime Porte and Greece being unable to agree upon the rectification of frontier suggested in the 13th Protocol of the Congress of Berlin, Germany, Austria-Hungary, France, Great Britain, Italy, and Russia reserve to themselves to offer their mediation to the two parties to facilitate the negotiations.”

LXXXV. Tenthly.—As to States standing in a Feudal Relation to other States. These may be said to be now confined to the provinces of Turkey (i).

The existing independent Regencies tributary to the Sublime Porte now are :—Tunis, Tripoli, and Egypt. There is also the peculiar position of Cyprus under the recent Treaty between the Porte and Great Britain to be considered.

LXXXVI. The relations subsisting between the Porte and these tributary States is of an anomalous and perplexing character ; nor have the Great Powers of Europe been always agreed as to the light in which all these Regencies are to be considered.

LXXXVII. First, with respect to the Barbary States, which are tributary to the Porte. These have been almost

(i) Koch, *Hist. des Tr.* iv. 388, 424, 438. *Chambers's Encycl.* “ Tripoli,” vol. ix. p. 553.

of necessity treated to a certain extent, and for certain purposes, as *de facto* independent States, though their *de jure* subordination to the Porte was undisputed.

The course (*j*) which the European Powers have adopted has been such as, on the one hand, would recognize the Supremacy (*Suzeraineté*) of the Porte over its dependencies; while, on the other hand, these Powers have often demanded and enforced redress in vindication of the injuries done to their subjects, immediately and in the first instance from these dependencies themselves.

The necessity of the cases, and the reason of the thing, have rendered this irregular mode of International proceeding unavoidable.

“Nature” (Mr. Burke (*k*) observes, with his usual sagacity) “has said it, that the Turk cannot govern Egypt, Arabia, and Curdistan as he governs Thrace. Nor has he the same dominion in Crimea which he has at Brusa and Smyrna. . . . The Sultan gets such obedience as he can. He governs with a loose rein that he may govern at all; and the whole force and vigour of his authority in his centre is derived from a prudent relaxation in all his borders.”

LXXXVIII. Since the conquest of Algiers by France (1830), *Tripoli* and *Tunis* are the only Barbary States (*Ré-gences barbaresques*) tributary to the Porte. Indeed, *Tripoli* is, properly speaking, not a Barbary State under the protection of the Porte, but a province of the Porte, in the

(*j*) *Mably, Le Droit public de l'Europe*, t. i. c. v. “Le commerce ne seroit point en sûreté contre les Puissances de la côte de l'Afrique, si l'on se contentoit de prendre à ce sujet des engagemens avec la Porte. . . . Aussi la France, l'Angleterre, les Provinces-Unies, etc., traitent-elles directement avec Tunis, Tripoli, Alger, etc. Cependant ces Barbaresques, n'observant leurs traités qu'autant qu'ils y sont forcés, s'exposent souvent à être châtiés avec vigueur; et dans ces occasions il est très-avantageux d'avoir contracté de telle façon avec le Grand Seigneur qu'il ne puisse prendre leur défense.”—*Ib.* p. 396.

*Wheaton's Elém. de Droit Inter.* p. 49; *Wheaton's Hist.* p. 536.

(*k*) *Speech on Conciliation with America.*—*Burke's Works*, vol. iii. pp. 56, 57.



same condition and category as Bagdad or any other province of the Ottoman Power. The Bey is appointed and removed at the pleasure of the Sultan: nevertheless, European Powers have entered into Treaties with the Bey (*l*) as an independent Power, and have sought redress from him, in the first instance, for injuries inflicted on their subjects.

LXXXIX. *Tunis*, at the present time, stands in a different and more independent category. The Bey is Hereditary Regent, and practically, if not theoretically, also irremovable by the Sultan, though, like Egypt, tributary to the Porte.

In 1803 (*m*), nevertheless, the Porte addressed a Firman equally to Tunis and Tripoli, commanding both Regencies to obey the conditions of a Treaty of navigation and commerce which the Porte had entered into with Prussia, and which related to both Tripoli and Tunis.

In 1813 a Treaty was entered into between Great Britain and Tunis (*n*), by which this Regency agreed to accord to the inhabitants of the Ionian Islands the privileges of British subjects, provided Algiers and Tripoli adopted the same course.

XC. The principal circumstances which mark the recognition by the European Powers of the *Suzeraineté* of the Porte over these Regencies appear to be these:—

1. That they do not accredit *Public Ministers* to the Courts of these Regencies, but send *Consuls* only (*o*).

2. That when the Beys, Pachas, or Governors of these Regencies visit the European Courts, they are *presented* there by the Ambassador of the Porte, and are not received as the representatives of an independent State. France, it is believed, has not always been so particular as Great

(*l*) The Bey styles himself, in these Treaties, "Bey, Gouverneur et Capitaine-Général de la cité et royaume (or régence) de Tripoli." See Treaties of 1762 and 1818 (last Treaty) between Tripoli and Great Britain; Treaty of 1830 (last Treaty) between France and Tripoli.

(*m*) *De Martens et de Cussy, Rec. de Tr.* ii. 311.

(*n*) *Ib.* 401.

(*o*) *Vide post*, the important distinction in International Law between the Public Minister and the Consul.

Britain in the observance of this not insignificant point of etiquette.

3. That they have recognized the rule, however departed from in emergencies, either of negotiating through the Porte with respect to these Regencies, or of obtaining the subsequent confirmation of the Porte for arrangements entered into with these Regencies.

XCI. *Morocco*, it may be observed in passing, is unquestionably an Independent State, of which the Emperor is the International Representative. Various Treaties between him and European Powers have been from time to time concluded, without any reference direct or indirect to the Porte (*p*).

XCII. The mountainous province of *Montenegro*, which was a district of Western Turkey, consisted of an elevated plain, separated by a narrow strip of Austrian territory from the Adriatic, bounded on the north-west and north by the Bosnian Herzegovina, on the east and south by the Albanian Pachalic of Scutari, and on the south-west by the Austrian frontier of Dalmatia, at the Bocca di Cattaro (*q*).

This singular region of mountain fortresses, which was occupied by Ivan Czernojewich, who left his paternal domains near the Lake Scutari towards the end of the fifteenth century, has ever since that period been in a semi-independent condition.

At first, the Montenegrins, having adopted the Greek religion, were placed under the Protectorate of Venice; but in 1623, after a desperate resistance, they were compelled to pay a capitation tax (*haratsch*) to the Sultan.

The Montenegrins have been till lately governed by a Prince Bishop of the Greek Church, called a *Vladika*. For

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(*p*) For the Treaty settling the frontiers between French Algeria and Morocco see *Guizot's Mém.* vii. ch. xli. (1841-7).

(*q*) *Wilkinson, Dalmatia and Montenegro*, 2 vols. 1848.

*Treaty of Carlowitz*, 1691; *Schmauss*, ii. 1131.

*Treaty of Passarowitz*, 1718; *Schmauss*, ii. 1705.

*Treaty of Belgrade*, 1739; *Wenck, Cod. J. Gent.* i. 316.

*Treaty of Sistowa*, 1791; *Martens, Rec. de Tr.* vol. v. p. 246.

a century and a half this dignitary appears to have been hereditary in the *Petrovitsch* family; but since 1830 the Prince has been a layman.

In former editions of this work reference has been made to portions of the history of this gallant and interesting people. But the recent Treaty of Berlin has placed their liberty and independence upon a new, and, it is to be hoped, safe foundation.

The Articles of that Treaty bearing upon Montenegro are as follows:—

ARTICLE XXVI. The independence of Montenegro is recognized by the Sublime Porte and by all those of the high contracting parties who had not yet admitted it.

“ARTICLE XXVII. The high contracting parties are agreed on the following conditions:—

“In Montenegro the distinction of religious beliefs and confessions shall not be objected to any person as a reason for exclusion or incapacity as regards the enjoyment of civil and political rights, the admission to public employments, functions, and honours, or the exercise of the various professions and industries in any locality whatsoever.

“The freedom and the outward practice of all forms of worship shall be secured to the natives of Montenegro, as well as to foreigners, and no hindrance shall be given either to the hierarchical organisation of different communities or to their relations with their spiritual chiefs.”

By ARTICLE XXVIII. the new frontiers of Montenegro are fixed.

ARTICLE XXIX. is as follows:

“Antivari and the sea-coast belonging to it are annexed to Montenegro under the following conditions:—

“The districts situated to the south of that territory, in accordance with the delimitation above laid down, as far as the Boyana, including Dulcinjo, shall be restored to Turkey.

“The Commune of Spica, as far as the southernmost point

“ of the territory indicated in the detailed description of the  
“ frontiers, shall be incorporated with Dalmatia.

“ Montenegro shall have full and entire liberty of naviga-  
“ tion on the Boyana. No fortifications shall be constructed  
“ on the course of that river except such as may be neces-  
“ sary for the local defence of the stronghold of Scutari,  
“ and they shall be confined within a limit of 6 kilometres  
“ of that town.

“ Montenegro shall have neither ships of war nor flag of  
“ war.

“ The port of Antivari and all the waters of Montenegro  
“ shall remain closed to the ships of war of all nations.

“ The fortifications situated on Montenegrin territory be-  
“ tween the lake and the coast shall be razed, and none can  
“ be rebuilt within this zone.

“ The administration of the maritime and sanitary police,  
“ both at Antivari and along the coast of Montenegro, shall  
“ be in the hands of Austria-Hungary by means of light  
“ coast-guard boats.

“ Montenegro shall adopt the maritime code in force in  
“ Dalmatia. On her side Austria-Hungary undertakes to  
“ grant Consular protection to the Montenegrin merchant  
“ flag.

“ Montenegro shall come to an understanding with  
“ Austria-Hungary on the right to construct and keep up  
“ across the new Montenegrin territory a road and a rail-  
“ way. Absolute freedom of communication shall be guaran-  
“ teed on these roads.

“ ARTICLE XXX. Mussulmans or others in possession  
“ of property in the territories annexed to Montenegro, and  
“ who wish to reside outside the Principality, can retain  
“ their real property either by farming it out, or by having  
“ it administered by third parties.

“ No one shall be liable to be evicted otherwise than  
“ legally for the public welfare, and by means of a previous  
“ indemnity.

“ A Turco-Montenegrin Commission shall be appointed

“ to settle, during a period of three years, all matters relative to the manner of alienating, cultivating, and working, for the benefit of the Sublime Porte, the properties of the State, and the religious establishments (*Vakoufs*), as well as questions relative to the interests of private parties connected with these.

“ ARTICLE XXXI. The Principality of Montenegro shall come to a direct understanding with the Ottoman Porte with regard to the establishment of Montenegrin agents at Constantinople, and at certain places in the Ottoman Empire where they shall be decided to be necessary.

“ Montenegrins travelling or residing in the Ottoman Empire shall be subject to the laws and authorities of Turkey, according to the general principles of international law, and the established customs with regard to Montenegrins.

“ ARTICLE XXXII. The Montenegrin troops shall be bound to evacuate, in twenty days from the date of the ratification of the present Treaty, or sooner if possible, the territory that they occupy at present beyond the new limits of the Principality.

“ The Ottoman troops shall evacuate the territory ceded to Montenegro in the same period of twenty days. They shall have, however, allowed them a supplementary period of fifteen days, as well for evacuating the fortresses and withdrawing provisions and material of war from them, as for drawing up inventories of the implements and objects which cannot be immediately removed.

“ ARTICLE XXXIII. As Montenegro is to bear her share of the Ottoman public debt for the additional territories given her by the Treaty of Peace, the Representatives of the Powers at Constantinople are to determine the amount of the same in concert with the Sublime Porte at a fair valuation.”

XCIII. The districts of Eastern Europe called Moldavia and Wallachia were two Principalities situated between the Carpathian mountains, the Danube, and the Pruth.

After undergoing various vicissitudes of fortune they now constitute the State of *Roumania*, governed by an hereditary Prince. They were the subject of the following provisions in the recent Treaty of Berlin :—

“ARTICLE XLIII. The high contracting parties recognize the independence of Roumania, making it dependent on the conditions laid down in the two following articles.

“ARTICLE XLIV. In Roumania the difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of various professions and industries in any locality whatsoever.

“The freedom and outward exercise of all forms of worship will be assured to all persons belonging to the Roumanian State, as well as to foreigners, and no hindrance shall be offered either to the hierarchical organisation of the different communions, or to their relations with their spiritual chiefs.

“The nationals of all the Powers, traders or others, shall be treated in Roumania without distinction of creed, on a footing of perfect equality.

“ARTICLE XLV. The Principality of Roumania restores to his Majesty the Emperor of Russia that portion of the Bessarabian territory detached from Russia by the Treaty of Paris in 1856, bounded on the west by the waterway of the Pruth, and on the south by the waterway of the Kilia branch and the mouths of Stary-Stamboul.”

ARTICLE XLVI. Specifies the territories added to Roumania, including the Dobroutcha and the territory situated south of it, as far as a line starting eastward of Silistria to the Black Sea. . . . .

“ARTICLE L. Until the conclusion of a Treaty between Turkey and Roumania, regulating the privileges and attributes of Consuls, Roumanian subjects travelling or sojourning in the Ottoman Empire, and Ottoman subjects

“travelling or sojourning in Roumania, shall enjoy all rights  
“guaranteed to the subjects of other European Powers.

“ARTICLE LI. With regard to public works and other  
“enterprises of a like nature, Roumania will be substituted  
“for the Sublime Porte as regards its rights and obligations  
“throughout the ceded territory. . . .

“ARTICLE LIII. The European Commission of the  
“Danube, in which Roumania shall be represented, will con-  
“tinue in the discharge of its duties, and will exercise them  
“henceforth as far as Galatz in complete independence of  
“the territorial authorities. All the Treaties, arrangements,  
“acts, and decisions relating to its rights, privileges, pre-  
“rogatives, and obligations are confirmed.”

XCV. (*r*) *Servia* is a Principality once included within the limits of European Turkey. It is bounded on the north by the Austrian Empire; on the east by Wallachia and Bulgaria; on the south by Roumelia and Bosnia, and on the west by Bosnia.

Servia Proper contains about a million and a half of inhabitants; but the Servian race is said to amount to five millions in number, and to occupy one-third of the European territories of Turkey, and all the south of Hungary.

In the middle ages the Chief of this people assumed the title of Emperor of the East, and was only subdued by the united forces of the adjoining nations.

The Servian empire was at last divided between Austria and the Porte. By the Treaty of Passarowitz, in 1718, the Porte ceded the north of Servia, with the capital Belgrade, to Austria, but regained this territory by the Treaty of Belgrade in 1739. In 1801 the struggle of the Servians for liberty began to be aided—at first secretly, and after 1809 openly—by Russia; and the Treaty of Bucharest, in 1812, between Russia and the Porte, contained in its eighth Article a provision securing, among other things, to the natives the internal administration of their affairs, on the payment of a moderate contribution to Turkey. In 1813 the

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(*r*) § XCIV. of the old editions is omitted.

Servian insurrection broke out again, but, no longer assisted by Russia, was put down with circumstances of horrible barbarity. The Servians applied in vain to the Congress of Vienna for the mediation of Christendom in their favour. But the Greek insurrection in 1821, and the subsequent independence of Greece, operated favourably upon the condition of Servia; and it was recognized by the European Powers as a distinct and independent nation, governed by a native Prince; though a Turkish garrison was till recently maintained in Belgrade, and though a tribute was paid to the Porte till 1876.

Beside the Treaty of Bucharest, already mentioned, between Russia and the Porte, the Treaties of Ackermann in 1826, and of Adrianople in 1829, are to be consulted for the former national *Status* of Servia. By the recent Treaty of Berlin the future *Status* of Servia is as follows—

“ARTICLE XXXIV. The high contracting parties recognize the independence of the Principality of Servia, subject to the conditions set forth in the following article :—

“ARTICLE XXXV. In Servia the distinction of religious creeds and confessions shall not be raised against any one as a motive of exclusion or of incapacity in everything that concerns the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of the various professions and industries, in any locality whatever.

“The freedom and the open observance of all forms of worship shall be assured to all persons of Servian origin, as well as to foreigners, and no obstacle shall be opposed either to the hierarchical organization of the different communities, or to their relations with their spiritual superiors.

“ARTICLE XXXVI. Servia receives the territories included in the subjoined delimitation,” which are then set forth.

“ARTICLE XXXVII. Until the conclusion of fresh arrangements there shall be no change in Servia in the actual conditions of the commercial relations of the Principality with foreign countries.



“No transit duties shall be levied on goods passing through Servia.

“The immunities and privileges of foreign subjects, as well as the Consular rights of protection and jurisdiction, such as they now exist, shall remain in full vigour, as long as they shall not have been modified by mutual consent between the Principality and the Powers interested.

“ARTICLE XXXVIII. The Principality of Servia takes the place, for its part, of the Sublime Porte, in its engagements both towards Austria-Hungary and towards the Company for the working of the railways of Turkey in Europe, in respect to their completion and connection, as well as for the working of the railways to be constructed on the territory newly acquired by the Principality.

“The Conventions necessary for settling these questions shall be concluded immediately after the signature of the present Treaty between Austria-Hungary, the Porte, Servia, and, in the limits of its competency, the Principality of Bulgaria.

“ARTICLE XXXIX. Mussulmans in possession of property in the territories annexed to Servia, and who wish to reside outside the Principality, can retain their real property, either by farming it out or by having it administered by third parties.

“A Turco-Servian Commission shall be appointed to settle, during a period of three years, all matters relative to the manner of alienating, cultivating, and working, for the benefit of the Sublime Porte, the properties of the State, and the religious establishments (*Vakoufs*), as well as questions relative to the interests of private parties connected with these.

“ARTICLE XL. Until the conclusion of a Treaty between Turkey and Servia, Servian subjects travelling or sojourning in the Ottoman Empire shall be treated according to the general principles of International Law.

ARTICLE XLI. “The Servian troops shall be bound to evacuate, within fifteen days from the exchange of the

“ratifications of the present Treaty, the territory not comprised within the new limits of the Principality.

“The Ottoman troops shall evacuate the territories ceded to Servia within the same term of fifteen days. A supplementary term of an equal number of days shall, however, be granted to them as well for evacuating the strongholds and withdrawing the provisions and material as for preparing the inventory of the implements and objects which cannot be removed at once.

“ARTICLE XLII. Servia having to support a part of the Ottoman public debt in respect of the new territories annexed to her by the present Treaty, the representatives at Constantinople will fix the amount of it in concert with the Sublime Porte on an equitable basis.”

XCVa. *The Island of Cyprus (s).*—At the close of the recent war, the island of Cyprus was assigned by the Sultan to be “occupied and administered” by England. The international position of this island has become so peculiar and anomalous that it is necessary to give the very words of the Treaty and Annex by which this position is created. It appears from a preceding Despatch (May 30, 1878) of the English Foreign Secretary to the English Ambassador at the Porte, that England was alarmed at the possible effect upon her Indian possessions of the Russian conquests in Asia sanctioned by the Treaty of Berlin, inasmuch as they might, if the Porte had “no guarantee for its continued existence but its own strength,” conduce to “the speedy fall of the Ottoman domination,” and that thereby the “Oriental interests of Great Britain” might be seriously affected.

The provisions of the Treaty are as follows:—

“ARTICLE I. If Batoum, Ardahan, Kars, or any of them shall be retained by Russia, and if any attempt shall be made at any future time by Russia to take possession of any further territories of his Imperial Majesty the Sultan

“in Asia, as fixed by the definitive Treaty of Peace,  
 “England engages to join his Imperial Majesty the Sultan  
 “in defending them by force of arms.

“In return, his Imperial Majesty the Sultan promises  
 “to England to introduce necessary reforms, to be agreed  
 “upon later between the two Powers, into the government,  
 “and for the protection, of the Christian and other subjects  
 “of the Porte in these territories (*t*) ; and in order to enable  
 “England to make necessary provision for executing her  
 “engagement, his Imperial Majesty the Sultan further  
 “consents to assign the Island of Cyprus to be occupied and  
 “administered by England.”

The Treaty was signed at Constantinople, June 4, 1878.

The following Annex, signed July 1, 1878, at Constantinople, was attached to this Convention.

“It is understood between the two high contracting  
 “parties that England agrees to the following conditions  
 “relating to her occupation and administration of the Island  
 “of Cyprus :--

“I. That a Mussulman religious tribunal (Mehkéméi  
 “Shéri) shall continue to exist in the Island, which will take  
 “exclusive cognizance of religious matters, and of no others,  
 “concerning the Mussulman population of the Island.

“II. That a Mussulman resident in the Island shall be  
 “named by the Board of Pious Foundations in Turkey  
 “(Evkraf) to superintend, in conjunction with a delegate  
 “to be appointed by the British authorities, the adminis-  
 “tration of the property, funds, and lands belonging to  
 “mosques, cemeteries, Mussulman schools, and other re-  
 “ligious establishments existing in Cyprus.

“III. That England will pay to the Porte whatever is  
 “the present excess of revenue over expenditure in the

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(*t*) “En revanche, sa Majesté Impériale le Sultan promet à l'Angle-  
 terre d'introduire les réformes nécessaires (à être arrêtées plus tard par  
 les deux Puissances) ayant trait à la bonne administration et à la protec-  
 tion des sujets Chrétiens et autres de la Sublime Porte qui se trouvent  
 sur les territoires en question.”

“Island; this excess to be calculated upon and determined  
 “by the average of the last five years, stated to be 22,936  
 “purses, to be duly verified hereafter, and to the exclusion  
 “of the produce of State and Crown lands let or sold during  
 “that period.

“IV. That the Sublime Porte may freely sell and lease  
 “lands and other property in Cyprus belonging to the  
 “Ottoman Crown and State (Arazii Miriyé vé Emlaki  
 “Houmayoun) the produce of which does not form part of  
 “the revenue of the Island referred to in Article III.

“V. That the English Government, through their com-  
 “petent authorities, may purchase compulsorily, at a fair  
 “price, land required for public improvements, or for other  
 “public purposes, and land which is not cultivated.

“VI. That if Russia restores to Turkey Kars and the  
 “other conquests made by her in Armenia during the last  
 “war, the Island of Cyprus will be evacuated by Eng-  
 “land, and the Convention of June 4, 1878, will be at an  
 “end”(u).

XCVB. Cyprus is ceded by the Porte for the purposes  
 of *occupation* and *administration* by England. These terms  
 are the same as those employed in the recent transfer of  
 Bosnia and Herzegovina to Austria, who has now established  
 her authority over these provinces after much bloodshed,  
 and by the employment of a large military force.

The terms are new and vague. The language of the  
 Treaty and Annex would lead to the inference that the  
 Queen of England stood somewhat in the relation of the  
 Khedive to the Sultan, not possessed of the property,

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(u) In the Despatch last referred to, the English Foreign Secretary  
 had written—“Inasmuch as the whole of this proposal is due to the  
 annexations which Russia has made in Asiatic Turkey, and the conse-  
 quences which it is apprehended will flow therefrom, it must be fully  
 understood that if the cause of the danger should cease, the precautionary  
 agreement will cease at the same time. If the Government of Russia  
 should at any time surrender to the Porte the territory it has acquired  
 in Asia by the recent war, the stipulations in the proposed agreements  
 will cease to operate, and the island will be immediately evacuated.”

but of the usufruct of the island, with certain exceptions, and with the obligation of a certain money payment. Direct powers of legislation do not seem to be given, and the whole tenure, whatever its nature may be, of the island is to cease if a third State, Russia, who is no party to the Treaty, restores certain places, now in her possession by right of conquest, to the Porte. But whatever may be the difficulties of construing this Convention, England has lost no time in cutting the knot, after her own practical fashion, so far as her own interests are concerned, by the issue of an Order in Council on September 14, 1878 (*x*), which, though reciting the Foreign Jurisdiction Act, seems to treat Cyprus like Malta, or any possession of the kind, and which contains no reference whatever to the authority of the Porte, except by repeating an Order in Council relating to consular jurisdiction in the dominions of the Porte (*y*).

XCVc. This Order, which may be revoked or altered by the Queen in Council, begins as follows :

“Whereas it is expedient to make provision for the exercise of the power and jurisdiction vested by treaty in her Majesty the Queen in and over the Island of Cyprus :

“Now, therefore, her Majesty, by virtue of the powers in this behalf by the Foreign Jurisdiction Acts, 1843 to 1878, or otherwise in her vested, is pleased, by and with the advice of her Privy Council, to order, and it is ordered, as follows:—

“I. There shall be a High Commissioner and Commander-in-Chief (herein-after called ‘the High Commissioner’) in and over the said Island of Cyprus (herein-after called ‘the said Island’), and the person who shall fill the said office of High Commissioner shall be from time to time appointed by Commission under her Majesty’s Sign-Manual and Signet.

“II. The High Commissioner shall administer the

(*x*) See *London Gazette*, October 1, 1878.

(*y*) See Art. xxvii. of Order in Council.

“government of the said Island in the name and on behalf  
 “of her Majesty, and shall do and execute in due manner  
 “all things that shall belong to his said command and to  
 “the trust thereby reposed in him, according to the several  
 “powers and authorities granted or appointed to him by  
 “virtue of this Order, and of such Commission as may be  
 “issued to him under her Majesty’s Sign-Manual and  
 “Signet, and according to such instructions as may from  
 “time to time be given to him under her Majesty’s  
 “Sign-Manual and Signet, or by Order of her Majesty in  
 “Council, or by her Majesty through one of her Prin-  
 “cipal Secretaries of State, and according to such laws and  
 “ordinances as are or shall hereafter be in force in the said  
 “Island.”

The High Commissioner is to be aided by Legislative and Executive Councils, with power to make and unmake laws and ordinances, and to make grants and disposition of lands; and a power to give free pardons is couched in very broad language—“to any offender convicted of any crime in any  
 “court or before any judge” (z). A serious difficulty (a) may arise with respect to the subjects of European States, who are not English subjects. All the great European States have special capitulations and conventions with the Porte, as to the administration of justice, civil and criminal, over their subjects in the Ottoman dominions. Cyprus appears to remain Ottoman territory. Of course no Treaty between England and Turkey, or Order in Council of England, can affect the right of Foreign States.

XCVd. The following were the divisions of European Turkey, with their chief towns, before the Treaty of Berlin, 1878:—

Roumelia, or Rumili . . .	{	N.E. part, Constantinople, Adrianople, Philippopoli or Filibe, Selimno, Gallipoli; S. part, Saloniki, Seres, Monastir.
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(z) Art. xxii.

(a) *Vide post*, ch. xix.

Thessaly . . . . .	{	Yeni-shehr (anciently Larissa), Tricala.
Albania . . . . .	{	Scutari, Yanina or Yoanina, Souli, Avlona or Valona, Arta.
Bulgaria . . . . .	{	Sophia, Silistria, Rustchuk, Widdin, Sistova, Shumla, Tirnova.
Bosnia . . . . .		Bosnaserai, Zvornik, Traunik.
Turkish Croatia . . . . .		Bania-louka, Bihacs.
Turkish Dalmatia . . . . .		Trebigni, Mostar.
Candia . . . . .	{	Castro or Candia, Khanea or Canea, Retimo (b).

Great changes have been effected by the Treaty of Berlin in the relations of the Porte to these divisions, some of which, it will be seen, have become autonomous Principalities. Roumelia, however, before this Treaty was rather a geographical than a political designation—it has now become a distinct Province of Turkey, marked out by distinct metes and bounds.

XCVE. By Article XIII. of the Treaty of Berlin “a province is formed south of the Balkans which will take the name of ‘*Eastern Roumelia*,’ and will remain under the direct political and military authority of his Imperial Majesty the Sultan, under conditions of administrative autonomy. It will have a Christian Governor-General.”

By Article XIV. “Eastern Roumelia is bounded on the north and north-west by Bulgaria, and comprises the territories included by the following line.” The territories are then enumerated.

By Article XV. “His Majesty the Sultan will have the right of providing for the defence of the land and sea frontiers of the province by erecting fortifications on those frontiers, and maintaining troops there.

“Internal order is maintained in Eastern Roumelia by a native gendarmerie assisted by a local militia.

“Regard shall be had to the religion of the inhabitants

“in respect to the composition of these corps, the officers  
“of which are named by the Sultan, according to the  
“localities.

“His Imperial Majesty the Sultan engages not to employ  
“irregular troops, such as Bashi-Bazouks and Circassians,  
“in the garrisons of the frontiers. The regular troops des-  
“tined to this service must not in any case be billeted on the  
“inhabitants. When they pass through the province they  
“will not be allowed to sojourn there.”

By Article XVI. “the Governor-General will have the  
“right of summoning the Ottoman troops in the event of  
“the internal or external security of the province being  
“threatened. In such an eventuality the Sublime Porte  
“shall inform the representatives of the Powers at Con-  
“stantinople of the decision, as well as of the exigencies  
“which justify it.”

By Article XVII. “the Governor-General of Eastern  
“Roumelia shall be named by the Sublime Porte, with the  
“assent of the Powers, for a term of five years.”

By Article XVIII., “immediately after the exchange of  
“the ratifications of the present Treaty, a European Com-  
“mission shall be formed to elaborate, in accord with the  
“Ottoman Porte, the organization of Eastern Roumelia.  
“This Commission will have to determine, in a period of  
“three months, the powers and functions of the Governor-  
“General, as well as the administrative system, judicial and  
“financial, of the province, taking as its starting-point the  
“different laws for the vilayets and the proposals made in  
“the eighth sitting of the Conference of Constantinople.

“The whole of the arrangements determined on for  
“Eastern Roumelia will form the subject of an Imperial  
“Firman, which will be issued by the Sublime Porte, and  
“which it will communicate to the Powers.”

By Article XIX. “the European Commission shall be  
“charged to administer, in accord with the Sublime Porte,  
“the finances of the province until the completion of the new  
“organization.”



By Article XX. "the Treaties, Conventions, and international arrangements of any kind whatsoever, concluded or to be concluded between the Porte and foreign Powers, shall be applicable in Eastern Roumelia as in the whole Ottoman Empire. The immunities and privileges acquired by foreigners, whatever their position, shall be respected in this province. The Sublime Porte undertakes to have observed there the general laws of the Empire for religious liberty in favour of all forms of worship."

By Article XXI. "the rights and obligations of the Sublime Porte with regard to the railways of Eastern Roumelia shall be maintained in their integrity."

By Article XXII. "the effective force of the Russian corps of occupation in Bulgaria and Eastern Roumelia shall be composed of six divisions of infantry and two divisions of cavalry, and shall not exceed 50,000 men. It shall be maintained at the expense of the country occupied. The army of occupation will preserve its communications with Russia not only through Roumania, in accordance with arrangements to be concluded between the two States, but also through the ports of the Black Sea, Varna and Bourgas, where they may, during the period of occupation, organize the necessary depots.

"The period of the occupation of Eastern Roumelia and Bulgaria by the Imperial Russian troops is fixed at nine months from the date of the exchange of the ratifications of the present Treaty.

"The Imperial Russian Government undertakes that within nine months the passage of its troops across Roumania shall cease, and the Principality shall be completely evacuated."

XCVF. *Bosnia and Herzegovina*.—By Article XXV. of the same Treaty it is provided that "the Provinces of Bosnia and Herzegovina shall be occupied and administered by Austria-Hungary. The Government of Austria-Hungary, not desiring to undertake the administration of the Sandjak of Novi-Bazar, which extends between Servia and

“ Montenegro in a south-easterly direction to the other side  
 “ of Mitrovitza, the Ottoman administration will remain in  
 “ force there. Notwithstanding, in order to assure the main-  
 “ tenance of the new political state of affairs, as well as freedom  
 “ and security of communications, Austria-Hungary reserves  
 “ the right of keeping garrisons and having military and com-  
 “ mercial roads in the whole of this part of the ancient  
 “ Vilayet of Bosnia. With this object the Governments of  
 “ Austria-Hungary and Turkey reserve to themselves to come  
 “ to an understanding as to the details.” Austria has lost no  
 time in effecting a military occupation of these provinces.

XCVG. By Article I. of the same Treaty “ *Bul-*  
*garia* is constituted an autonomous and tributary Princi-  
 “ pality under the suzerainty of his Imperial Majesty the  
 “ Sultan. It will have a Christian government and a  
 “ national militia.”

By Article II. the Principality of Bulgaria will in-  
 clude certain territories which are enumerated,

By Article III. “ the Prince of Bulgaria shall be freely  
 “ elected by the population and confirmed by the Sublime  
 “ Porte, with the consent of the Powers. No member of  
 “ any of the reigning houses of the Great European Powers  
 “ shall be elected Prince of Bulgaria.

“ In case of a vacancy in the princely dignity, the elec-  
 “ tion of the new Prince shall take place under the same  
 “ conditions and with the same forms.”

By Article IV. “ an Assembly of Notables of Bulgaria,  
 “ convoked at Tirnova, shall, after the election of the Prince,  
 “ elaborate the organic law of the Principality.”

“ In the districts where Bulgarians are intermixed with  
 “ Turkish, Roumanian, Greek, or other populations, the  
 “ rights and interests of these populations shall be taken into  
 “ consideration in the question of election and the elabora-  
 “ tion of the organic law.”

Article V. on religious liberty is important (c). It pro-

vides "that the following points shall form the basis of  
"the public law of Bulgaria:

"A difference of religious beliefs or confessions shall not  
"exclude or incapacitate any person from the enjoyment of  
"civil and political rights, admission to public appointments,  
"functions, or honours, or from the exercise of the various  
"professions and employments, in any district whatsoever.

"Liberty, and the public exercise of all religions, shall be  
"assured to all persons belonging to Bulgaria, as well as to  
"strangers, and no obstacle shall be interposed either to the  
"hierarchical organisation of the different communions, or to  
"their connection with their spiritual heads."

By Article VI. "the provisional administration of Bul-  
"garia shall be under the direction of an Imperial Russian  
"Commissary until the settlement of the organic law.  
"An Imperial Turkish Commissary, as well as the Consuls  
"delegated *ad hoc* by the other Powers Signatories of the  
"present Treaty, shall be called to assist in controlling the  
"working of this provisional *régime*. In the event of dis-  
"agreement amongst the Consular Delegates, the majority  
"shall decide, and in case of a divergence between the  
"majority and the Imperial Russian Commissary, or the  
"Imperial Turkish Commissary, the Representatives of the  
"Signatory Powers at Constantinople, assembled in Con-  
"ference, shall decide."

By Article VII. "the provisional *régime* shall not be  
"prolonged beyond a period of nine months from the ex-  
"change of the ratifications of the present Treaty.

"When the organic law is completed the election of  
"the Prince of Bulgaria shall be proceeded with forthwith.  
"As soon as the Prince shall have been elected, the new  
"organization shall be put into force, and the Principality  
"shall enter into the full enjoyment of its autonomy."

By Article VIII. "the Treaties of Commerce and of  
"Navigation, as well as all the Conventions and arrange-  
"ments concluded between Foreign Powers and the Porte,  
"and now in force, are maintained in the Principality of

“ Bulgaria, and no change shall be made in them with regard to any one Power without its previous consent.

“ No transit dues shall be levied in Bulgaria on goods passing through that Principality.

“ The subjects and citizens (‘ nationaux ’) and commerce of all the Powers shall be treated in the Principality on a footing of strict equality.”

“ The immunities and privileges of foreigners, as well as the rights of consular jurisdiction and protection as established by the capitulations and usages, shall remain in force so long as they shall not have been modified with the consent of the parties concerned.”

By Article IX. “ the amount of the annual tribute which the Principality of Bulgaria shall pay to the Suzerain Court—such amount being paid into whatever bank the Porte may hereafter designate—shall be fixed by an agreement between the Powers Signatory of the present Treaty at the close of the first year of the working of the new organization. This tribute shall be reckoned on the mean revenue of the territory of the Principality.

“ As Bulgaria is to bear a portion of the public debt of the Empire, when the Powers shall fix the tribute they shall take into consideration what portion of that debt can, on the basis of a fair proportion, be assigned to the Principality.”

By Article X. “ Bulgaria takes the place of the Imperial Ottoman Government in its undertakings and obligations towards the Rustchuk-Varna Railway Company, dating from the exchange of the ratifications of the present Treaty. The settlement of the previous accounts is reserved for an understanding between the Sublime Porte, the Government of the Principality, and the administration of this company.

“ The Principality of Bulgaria likewise, on the other hand, takes the place of the Sublime Porte, in the engagements which it has contracted, as well towards Austria-Hungary as towards the Company, for working the rail-

“ ways of European Turkey in respect to their completion  
“ and connection, as well as for the working of the railways  
“ situated in its territory.

“ The Conventions necessary for the settlement of these  
“ questions shall be concluded between Austria-Hungary,  
“ the Porte, Servia, and the Principality of Bulgaria imme-  
“ diately after the conclusion of peace.”

By Article XI. “ the Ottoman army shall no longer  
“ remain in Bulgaria; all the old fortresses shall be razed  
“ at the expense of the Principality within one year or  
“ sooner if possible; the local Government shall imme-  
“ diately take steps for their demolition, and shall not be  
“ allowed to construct fresh ones.

“ The Sublime Porte will have the right of disposing as it  
“ likes of the war material and other effects belonging to the  
“ Ottoman Government which may have remained in the  
“ fortresses of the Danube already evacuated in virtue of  
“ the Armistice of the 31st January, as well as of those in  
“ the strongholds of Shumla and Varna.”

By Article XII. “ Mussulman proprietors or others who  
“ may take up their abode outside the Principality can con-  
“ tinue to hold there their real property, by farming it out,  
“ or having it administered by third parties.

“ A Turco-Bulgarian Commission shall be charged with  
“ the settlement, in the space of two years, of all questions  
“ relative to the mode of alienation, working, or use, on the  
“ account of the Sublime Porte, of State property and reli-  
“ gious foundations (*vakoufs*), as well as of the questions  
“ regarding interests of the individuals concerned therein.

“ Persons belonging to the Principality of Bulgaria, who  
“ shall travel or dwell in the other parts of the Ottoman  
“ Empire, will be subject to the Ottoman authorities and  
“ laws.”

XCVH. Article LXII. of this Treaty (*d*) upon the  
subject of Religious Liberty is important, having regard

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(*d*) *Vide ante*, Art. v., *et vide post*, chapter on Intervention.

to the right of Intervention which it may be maintained this Treaty gives to the Signatory Powers in the event of the infringement of its provisions.

“The Sublime Porte having expressed the wish to maintain the principle of religious liberty, and give it the widest scope, the contracting parties take note of this spontaneous declaration.

“In no part of the Ottoman Empire shall difference of religion be alleged against an individual as a ground for exclusion or incapacity as regards the discharge of civil and political rights, admission to the public service, functions and honours, or the exercise of the different professions and industries.

“All persons shall be admitted, without distinction of religion, to give evidence before the tribunals.

“Liberty and the outward exercise of all forms of worship are assured to all, and no hindrance shall be offered either to the hierarchical organisation of the various communions or to their relations with their spiritual chiefs.

“Ecclesiastics, pilgrims, and monks of all nationalities travelling in Turkey in Europe, or in Turkey in Asia, shall enjoy the same rights, advantages, and privileges.

“The right of official protection by the Diplomatic and Consular Agents of the Powers in Turkey is recognized both as regards the above-mentioned persons and their religious, charitable, and other establishments in the Holy Places and elsewhere.

“The rights possessed by France are expressly reserved, and it is well understood that no alterations shall be made in the *status quo* in the Holy Places.

“The Monks of Mount Athos, of whatever country they may be natives, shall be maintained in their former possessions and advantages, and shall enjoy, without any exception, complete equality of rights and prerogatives.”

XCVI. The 68th Article may give rise to some contention. It is somewhat vague, though by no means unimportant. It is as follows :—

“The Treaty of Paris of March 30, 1856, as well as the  
“Treaty of London of March 13, 1871, are maintained in  
“all such of their provisions as are not abrogated or modified  
“by the preceding stipulations.”

XCVIII (e). States that pay tribute, or stand in a feudal relation towards other States, are, nevertheless, sometimes considered as Independent Sovereignities. It was not till 1818 that the King of Naples ceased to be a nominal vassal of the Papal See; but this feudal relation was never considered as affecting his position in the Commonwealth of States. Of the same kind some German Jurists appear to consider the subsisting or former relation between Kniphausen and Oldenburg: but, in fact, it is a relation which can hardly be said to exist in these days, except where, as in the instances of the Barbary States, there is a direct and practical acknowledgment of a superior sovereignty.

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(e) §§ xevi. xcvii. in former editions are omitted.

## CHAPTER IIA.

## EGYPT.

XCIX. THE status of Egypt with respect to her international relation is very peculiar (*a*).

The conquest of Egypt was effected by Amrou, the General of the Caliphs, in 638 A.D., and from the death of Caliph Omar, in 644 A.D., it continued to be a province of the Arab empire under a Governor appointed by the Caliphs. This nominal subordination to the Caliphs appears to have continued while the government *de facto* was in the hands of various dynasties, who reigned under the title of Soldan or Sultan of Egypt. The last Sultan of the Memlook dynasty of Egypt, which had been established about 1250 A.D., was overthrown in 1517 A.D., by Selim I., the Ottoman Sultan of Constantinople.

About this time the last of the Caliphs in Egypt died; the Caliphate of Egypt came to an end, and the title of Caliph was thenceforward assumed by the Sultan of Constantinople. Although Selim I. abolished the dynasty of the Memlooks, he preserved an aristocracy of that race under the authority of the Viceroy, nominated by the Porte and designated Pacha of Egypt.

By this new Constitution, 24 Beys were created; and the obligation was imposed of sending tribute to Constantinople, and of furnishing 12,000 men in time of war. This quasi republic, composed of a Memlook aristocracy, was not wholly abolished till after the period of the French invasion, at the close of the last century. During this interval, however,

(*a*) From *The Charkieh* L. R. 4 Adm. & Eccl. p. 75 *seq.*



successful chieftains continually revolted from the Porte, and the more powerful of the Beys exercised absolute dominion over the country. In 1747 A.D. Ibrahim Kehia seized upon the supreme authority and declared the independency of Egypt. In 1758 A.D., Ali Bey, not the least remarkable of the warriors who rose to the surface in those troubled times, possessed himself of the government of Egypt, and ruled over that country some time with an appearance of deference to, and a recognition in the abstract of the sovereignty of the Porte, up to the period of 1774 A.D., when his eventful career was ended. In 1798 A.D., the invasion of Egypt by Buonaparte took place under the pretext of delivering Egypt from the Memlooks. In 1801 A.D. the victories of England once more restored Egypt to the dominion of the Porte.

In 1806 A.D., an important epoch begins. In that year Mehemet Ali obtained from the Sultan a legal nomination to the Pachalic of Egypt, the actual authority of which he was already exercising. After the departure of the English from Alexandria, and the massacre of the Memlook Beys, Mehemet took the command of forces previously sent by him into Arabia, to subdue the sect of the Wahabees. During the interval between this period and 1831 A.D. he possessed an army of 60,000 men, and a considerable navy, established a *de facto* empire from Senaar and Kadofan over all Syria to Adana, a part of Cilicia at the foot of Mount Taurus, and ruled over the island of Candia. The Porte, struggling with the rebellion of the Pacha of Ianina, not subdued till 1822 A.D., and the uprising of the Greeks, whose liberties were established by the battle of Navarino in 1827 A.D., opposed a fitful, underhand, and feeble opposition to the continued practical aggression, however disguised in language, of its great subject.

Between the battle of Navarino (1827 A.D.) and the Treaty, presently to be mentioned, of 1833 A.D., an important portion of Egyptian history intervenes. Mehemet Ali, on being refused the Pachalic of Acre by the Porte,

found various pretexts for the invasion of Syria, on the actual possession of which, it was manifest, the supremacy of the Porte or of the Khedive of Egypt would depend.

In 1831 A.D., the Egyptian army and Ibrahim Pacha passed the frontier. As soon as the Porte was apprised of this event, an order was immediately despatched to Mehemet Ali to recall his troops. To these and further orders he turned a deaf ear. An official declaration of war against him, preceded by a religious anathema or public declaration that he and his sons were rebels, and out of the pale of Mussulman law, did not stop his course.

In May 1832, Acre was captured by his troops. Not long afterwards all Syria was conquered for him by Ibrahim, his general and son. The armies of the Porte were routed and destroyed, and the advance of the conqueror upon Constantinople was only prevented by the intervention of the great European Powers. Nevertheless, by a kind of convention, usually called the treaty of Kutaieh, between the Sultan and Mehemet, the latter obtained a great addition of power and territory; for he retained possession of Syria and the passes of Mount Taurus, or the district of Adana. He undertook, indeed, to pay tribute for Syria, as well as Egypt; but, with his army and navy untouched, and with these possessions, the Pacha of Egypt was allowed to remain, in fact, more powerful than his nominal master at Constantinople.

But in the interval between 1833 A.D. and 1841 A.D. the scene is greatly changed. The actors remain, but play very different parts.

Nor is it unimportant to observe, that the stream of Egyptian political history, however immiscible the characters of the individual Mohammedan and Christian may be, has ever since this epoch been greatly affected by the currents of European diplomacy. I pass by earlier treaties, and the Treaty of Unkiar Skelessi in 1833 A.D., which, placing Turkey under the protectorate of Russia, has been superseded by a later Treaty. Mehemet Ali and Ibrahim, in

1834 A.D., pursued the scheme of uniting all the provinces belonging to the caliphate under their government; but discontents arose among the natives of Syria, which were not appeased by the disarmament of the Druses and of the population generally. These discontents revived the hopes of the Sultan, and in 1839 A.D., he sent another army into Syria, which was defeated at Nezib. But in 1840 A.D., Mehemet Ali was made aware that the European Powers would not allow an Arab empire to be established on the ruins of the Ottoman State.

England sent an agent to warn the Pacha of his danger, and, in answer to a statement of his rights, the following language was used: "I have to instruct you," said Lord Palmerston to Colonel Hodges, the agent employed, "on the next occasion on which Mehemet Ali shall speak to you of his rights, to say to his Highness, that you are instructed by your Government to remind him that he has no rights except such as the Sultan has conferred upon him; that the only legitimate authority which he possesses is the authority which has been delegated to him by the Sultan over a portion of the Sultan's dominions, and which has been entrusted to him for the sole purpose of being used in the interest and in obedience to the orders of the Sultan; that the Sultan is entitled to take away that which he has given; that the Sultan may probably do so if his own safety should require it; and that if in such case the Sultan should not have the means of self-defence, the Sultan has allies, who may possibly lend him those means" (b).

And on July 18, 1840, Lord Palmerston wrote to Colonel Hodges as follows: "You will see that orders have been given to the British fleet to act at once, by cutting off the communication between Syria and Egypt, and by helping the Syrians. If Mehemet Ali should complain of

(b) *Correspondence relating to the Affairs of the Levant, presented to Parliament in 1841. Part I. p. 502.*

“this, and of its being done without notice, you will remind him civilly that we are the allies of the Sultan, and have a right to help the faithful subjects of the Sultan in maintaining their allegiance, and to assist the Sultan against those of his subjects who are in revolt against him, as Mehemet Ali is; and that Mehemet Ali not being an independent Sovereign with whom the four Powers have any political relations, those Powers are not bound to give him any notice of their intended proceedings” (c).

And again on September 14, 1840, Lord Palmerston wrote: “With reference to your despatch of the 17th of August, I have to instruct you to state in writing to Mehemet Ali, if the state of things should render it necessary to do so, that Egypt is a portion of the dominions of the Sultan; that British subjects have certain rights and privileges as to the security of their persons, property, and commerce in all parts of the Ottoman Empire, by virtue of treaties concluded between the British Crown and the Porte; and that any subject of the Sultan, whether in a state of obedience to, or of revolt against the authority of the Sultan, who should take upon himself in any way or in the slightest degree to molest British subjects, or to interfere with the exercise of their rights and privileges, would incur a heavy and most serious responsibility” (d).

The principles of international policy enunciated in these despatches were fully carried into execution by the Convention of July 15, 1840, by which Austria, England, Prussia, and Russia concurred in the determination to protect the Porte by coercive measures, if necessary, against the Pacha. Whether the Pacha should be a Sovereign Prince, or a subject, however powerful, of the Porte, seems to have depended on the result of this war. But the consequence of this European intervention was the rapid

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(c) *Correspondence relating to the Affairs of the Levant, presented to Parliament in 1841. Part II. p. 5.*

(d) *Ibid. Part II. p. 187.*

overthrow of the Pacha's power in Syria; after which the Sultan issued to the Pacha the Firman of February 13, 1841.

In 1849, Mehemet Ali, having ceased to rule, on account of imbecility, in the preceding year, died, and was succeeded by Abbas, who died in 1854 A.D.; to him succeeded Said, who died in 1863 A.D., and to him succeeded the present Khedive. In 1866, 1867, 1869 A.D., circumstances induced the Porte to issue additional Firmans. In these documents, as well as in the Firman of 1841, and a further Firman in 1873 (e), granted after the judgment in *The Charkieh*, are to be found the existing relations between the Porte and the Pacha of Egypt, now called the Khedive. The principal and most important of these relations may be said to form part of the present public law of Europe.

The result of the historical inquiry as to the status of his Highness the Khedive, instituted in the case of *The Charkieh*, was as follows: That in the Firmans, whose authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman Empire; that the Egyptian army is regulated as part of the military force of the Ottoman Empire; that the taxes are imposed and levied in the name of the Porte; that the Treaties of the Porte are binding upon Egypt, and that she has no separate *jus legationis*; that the flag for both the army and navy is the flag of the Porte.

All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of States.

In accordance with these facts and the principles deducible from them, the Court of Admiralty decided in 1873, in the case of *The Charkieh*, that the ship of the Khedive was not entitled to the privileges of a vessel of war belonging to an independent State.

(e) Printed at length in the *Journal des Débats*, July 7, 1873.

On November 3, 1839, the Porte published an Ordinance for the regulation of its provinces and of its vassal States, called *Hatti-Sheriff of Gulhané*. This *Hatti-Sheriff* was followed by the promulgation of a collection of Laws called the *Tanzimat*, and this, with certain modifications, has been applied to Egypt by a *Firman décoré d'un Hatti-Sheriff* (f), of July 1852. This *Firman* appears to overrule the *Code d'Abbas*, which had been established in Egypt.

This *Firman* can hardly be said to affect the International relations of the Pacha; the principal derogation from the sovereignty of the latter consisting in the reservation to the Sultan of the power as to life and death over the subjects of the Pacha.

In the *Separate Act* annexed to the *Convention*, concluded at London on July 15, 1840, between the Courts of Great Britain, Austria, Prussia, and Russia on the one part, and the Sublime Ottoman Porte on the other, the International *Status* of Egypt is described in the following articles:—

“1. His Highness promises to grant to Mehemet Ali, “for himself and for his descendants in the direct line, the “administration of the Pachalic of Egypt; and his High- “ness promises, moreover, to grant to Mehemet Ali for his “life, with the title of Pacha of Acre, and with the com- “mand of the fortress of Saint John of Acre, the administra- “tion of the southern part of Syria, the limits of which shall “be determined by the following line of demarcation:—

“This line, beginning at Cape Ras-el-Nakhora, on the “coast of the Mediterranean, shall extend direct from thence “as far as the mouth of the River Seizaban, at the northern “extremity of the Lake of Tiberias. It shall pass along the “western shore of that lake. It shall follow the right of the “River Jordan and the western shore of the Dead Sea. From “thence it shall extend straight to the Red Sea, which it “shall strike at the northern point of the gulph of Akaba;

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(f) It describes itself as—“*Firman adressé à mon illustre et judicieux Vizir Abbas Halmi Pacha, actuellement et héréditairement Gouverneur de l'Egypte, avec le rang éminent de Grand Vizir.*”

“and from thence it shall follow the western shore of the  
“gulph of Akaba and the eastern shore of the gulph of  
“Suez, as far as Suez.”

“3. The annual tribute to be paid to the Sultan by  
“Mehemet Ali shall be proportioned to the greater or less  
“amount of territory of which the latter may obtain the  
“administration, according as he accepts the first or the  
“second alternative.”

“5. All the Treaties and all the laws of the Ottoman  
“Empire shall be applicable to Egypt and to the Pachalic  
“of Acre, such as it has been above defined, in the same  
“manner as to every other part of the Ottoman Empire.  
“But the Sultān consents, that on condition of the regular  
“payment of the tribute above mentioned, Mehemet Ali  
“and his descendants shall collect—in the name of the  
“Sultan, and as the delegate of his Highness, within the  
“provinces the administration of which shall be confided to  
“them—the taxes and imposts legally established. It is more-  
“over understood that, in consideration of the receipt of the  
“aforesaid taxes and imposts, Mehemet Ali and his descen-  
“dants shall defray all the expenses of the civil and military  
“administration of the said provinces.

“6. The military and naval forces which may be main-  
“tained by the Pacha of Egypt and Acre, forming part of  
“the forces of the Ottoman Empire, shall always be con-  
“sidered as maintained for the service of the State”(g).

Recently the Sultan and the Turkish Government were alarmed and offended by what they conceived to be conduct on the part of the Viceroy or Khedive, indicating a claim on his part to be treated as an independent Sovereign. This alarm, it is supposed, was partly founded on the reception of the Viceroy, by the different Courts of Europe, on his visits to them; on his invitation to foreign Powers to be present at the opening of the Suez Canal; on certain steps which he had taken to attract strangers, and to found

commercial establishments in Egypt, and on certain regulations with respect to the institution of schools ; and also on account of the purchase of vessels and ammunition of war.

The Turkish Minister addressed a letter of complaint upon these and other subjects to the Viceroy, in reply to which he denied that he had ever gone "beyond the limits of the "rights and duties prescribed by the Imperial Firmans." The Porte, however, insisted upon certain conditions, which, after diplomatic intervention, the Viceroy accepted (*h*).

XCIXA. *Suez Canal (i)*.—The recent war between Russia and the Porte brought out into a clear light the necessity for some determination on the part of the European, and perhaps of the American States, with respect to the international position of the Suez Canal in time of war. As a matter of fact, that great highway of communication to the East remained unimpeded by the blockade of either belligerent.

The course adopted by England is best explained by the following correspondence between the English Foreign Office and the English Ambassador at the Porte (*j*).

*" The Earl of Derby to Lord Lyons.*

" Foreign Office, May 16, 1877.

" My Lord,—M. de Lesseps called upon me at the " Foreign Office on the 10th inst., having, as he stated, come " expressly from Paris to lay before her Majesty's Govern- " ment a project for regulating the passage of ships of war " through the Suez Canal.

" I received him in company with the Chancellor of the " Exchequer, and he handed to me the draught project of " which I enclose a copy.

" After some conversation, I told him that the question " of the position of the Suez Canal under present circum- " stances was a difficult and delicate one, and that I could

(*h*) See the Viceroy's defence at length, *Ann. Reg.* 1869, p. 273.

(*i*) See debates in the House of Commons, May 4, 1877.

(*j*) Papers laid before Parliament, June 5, 1877 ; *The Times*, June 6.



“not then say more than that the project which he had  
“been good enough to submit to me should have full con-  
“sideration.

“Her Majesty’s Government have since carefully con-  
“sidered the project, and have come to the conclusion that  
“the scheme proposed in it for the neutralization of the  
“Canal by an International Convention is open to so many  
“objections of a political and practical character that they  
“could not undertake to recommend it for the acceptance of  
“the Porte and the Powers.

“Her Majesty’s Government are, at the same time,  
“deeply sensible of the importance to Great Britain and  
“other neutral Powers of preventing the Canal being in-  
“jured or blocked up by either of the belligerents in the pre-  
“sent war, and your Excellency is at liberty to inform M.  
“de Lesseps that her Majesty’s Government has intimated  
“to the Russian Ambassador that an attempt to blockade or  
“otherwise to interfere with the Canal or its approaches would  
“be regarded by her Majesty’s Government as a menace to  
“India, and as a grave injury to the commerce of the world.  
“I added that on both those grounds any such step—which  
“her Majesty’s Government hope and fully believe there is no  
“intention on the part of either belligerent to take—would  
“be incompatible with the maintenance by her Majesty’s  
“Government of an attitude of passive neutrality.

“Her Majesty’s Government will cause the Porte and  
“the Khedive to be made acquainted with the intimation  
“thus conveyed to the Russian Government, and her Ma-  
“jesty’s Ambassador at Constantinople and Agent in Egypt  
“will be instructed to state that her Majesty’s Government  
“will expect that the Porte and the Khedive will on their  
“side abstain from impeding the navigation of the Canal,  
“or adopting any measures likely to injure the Canal or its  
“approaches, and that her Majesty’s Government are firmly  
“determined not to permit the Canal to be made the scene  
“of any combat or other warlike operations.

“In stating this to M. de Lesseps, your Excellency will

“explain that her Majesty’s Government have thus taken  
 “the initiative in regard to the protection of the Canal  
 “on account of the pressing necessity, as regards British in-  
 “terests, of maintaining the security of the Canal, and they  
 “do not doubt that if the Canal were to be seriously  
 “menaced the French and other Governments would adopt  
 “a similar course.—I am, &c.

“DERBY.”

“*Memorandum by M. de Lesseps.*

“The very clear declaration made by the English Go-  
 “vernment to the two Houses of Parliament of its resolu-  
 “tion to maintain the freedom of the passage of the Suez  
 “Canal for its men-of-war has led me to believe that there  
 “might now be an opportunity of concluding an agreement  
 “with other Governments on this subject.

“As President of the Financial Company with which Eng-  
 “land is connected, I submit to Lord Derby a project simply  
 “expressing my personal views, which I have reason to be-  
 “lieve the Duc Decazes would be disposed to adhere to  
 “after a private conversation which I had with him yester-  
 “day morning.

“Should the British Minister not think it well to initiate  
 “negotiations with the other Cabinets, I would make, at  
 “Paris, to the representatives of the several Powers in-  
 “terested, the overtures which I have made to Lord Derby  
 “and the Duc Decazes.

“FERD. DE LESSEPS.

“London, May 10, 1877.”

“*International Agreement as to Passage of Ships of War  
 through the Suez Canal.*”

“Since the opening of the Suez Canal in 1869 the com-  
 “plete liberty of passage through the Maritime Canal and  
 “the ports connected with it has been respected for State  
 “vessels as well as for merchant ships, even on the part of  
 “belligerent Powers at the time of the Franco-German  
 “War.

“ The Governments of \* \* \* now agree to maintain the  
“ same liberty to all national or commercial vessels, whatever  
“ may be their flag and without any exception, it being  
“ understood that national ships will be subject to the mea-  
“ sures which the territorial authority may take to prevent  
“ ships in transit from disembarking on Egyptian territory  
“ any troops or munitions of war.”

“ *The Earl of Derby to Mr. Layard.*

“ Foreign Office, May 16.

“ Sir,—I transmit to your Excellency herewith a copy of  
“ a despatch which I have addressed to her Majesty’s Am-  
“ bassador at Paris, respecting a project, of which a copy is  
“ also inclosed, communicated to me by M. de Lesseps, for  
“ the neutralization of the Suez Canal.

“ Your Excellency will see that Her Majesty’s Govern-  
“ ment have declined to adopt that project, but have in-  
“ formed M. de Lesseps of the intimation made by her  
“ Majesty’s Government to the Russian Ambassador that  
“ an attempt to blockade or otherwise to interfere with the  
“ Canal or its approaches would be regarded by her  
“ Government as a menace to India, and as a grave injury  
“ to the commerce of the world, and that on both these  
“ grounds any such step—which her Majesty’s Government  
“ hope and fully believe there is no intention on the part of  
“ either belligerent to take—would be incompatible with the  
“ maintenance by her Majesty’s Government of an attitude  
“ of passive neutrality.

“ I have to request your Excellency to acquaint the  
“ Porte with the intimation thus conveyed to the Russian  
“ Government, and to state that her Majesty’s Government  
“ will expect that the Porte and the Khedive will, on their  
“ side, abstain from impeding the navigation of the Canal, or  
“ adopting any measures likely to injure the Canal or its  
“ approaches, and that her Majesty’s Government are firmly  
“ determined not to permit the Canal to be made the scene  
“ of any combat or other warlike operations.

“ I have addressed a similar despatch to her Majesty’s  
“ Agent and Consul-General in Egypt. I am, &c.

“ DERBY.”

The Suez Canal was not blockaded during the war, but it would be difficult to deny that if Russia, against whom the Khedive had furnished his quota of troops acting in the Ottoman army, had thought fit to adopt this mode of harassing her belligerent, she would not have been within her right in so doing. Custom and prescription indeed, as well as positive agreement, may clothe with the sanction of International Law such a position as England has assumed : a positive international agreement may effect this end more speedily. But it cannot be admitted that the might of one State can make the right in this matter. England also declared that she would not allow the Canal to be the scene of any combat or warlike operation. But she did not assert or imply that both the public and private ships of Russia would not be entitled to what Jurists call an *innocent passage* through the Canal. It was implied that, once in the Canal, all ships would be in neutral waters, but it was not denied that either belligerent might prevent the other from entering this neutral spot by combat in the open sea constituting the approach to the canal (*k*).

The neutrality of the Persian Gulf was, I believe, declared by Russia.

(*k*) Question put by Sir W. Harcourt in the House of Commons, June 7, 1877.

## CHAPTER III.

## STATES UNDER A FEDERAL UNION.

C. WE now arrive at the second branch of this part of our subject—namely, the consideration of several States under a Federal Union. The examples in modern times of this description of States are the following:—

1. The Germanic Confederation (*Der Deutsche Bund*) (*a*),  
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“Art. 2. This union is, in its relations, a self-subsisting Association of States, mutually independent of one another, with equal reciprocal rights and obligations; but, in its external relations, a collective power combined in political unity.

“Art. 3. The extent and limits which the Confederation has marked out for its operation are defined by the Federal Act, which is the original compact and first groundwork of this union: whilst it announces the object of the Confederation, it provides and determines at the same time its powers and obligations.

“Art. 4. The power of developing and perfecting the Federal Act, so far as the completion of the object therein set forth may require, belongs to the assembly of the members of the Confederation. The resolutions, however, to be adopted for this purpose may not contravene the spirit of the Federal Act, nor deviate from the fundamental character of the Confederation.”

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respect to its corporate capacity, and with respect to the individual members under its protection. And, first, it should be observed, that by the fiftieth article of the *Acte final (Wiener Schlusssacte)* of 1820, it is provided:

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“ to the Confederation, and to nominate, *if it should*  
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“ Confederation at Foreign Courts.
- “ 3. To conduct, when it may be necessary, negotiations,  
“ and conclude treaties on behalf of the Confedera-  
“ tion.
- “ 4. To interpose with Foreign States good offices on  
“ behalf of those members of the Confederation who  
“ desire them, and to employ the same agency with  
“ the separate States, members of the Confederation,  
“ on behalf of Foreign Governments who ask for  
“ such intervention.”

By the thirty-fifth article it is declared, that “ the Germanic Confederation has the right, as a collective body,  
“ to declare war, make peace, and contract alliances, and  
“ negotiate treaties of every kind ; nevertheless, according  
“ to the object of its institution, as declared in the second  
“ article of the Federal Act, the Confederation can only  
“ exercise these rights for its own defence, for the mainten-  
“ ance of the external security of Germany, and the inde-  
“ pendence and inviolability of each of the States of which  
“ it is composed.

“ Art. 36. The Confederated States having engaged, by  
“ the eleventh article of the Federal Act, to defend against  
“ every attack Germany in its entire extent, and each of its  
“ Co-States in particular, and reciprocally to guarantee the  
“ integrity of their possessions, comprised in the union, no

“ one of the Confederated States can be injured by a Foreign  
“ Power, without at the same time, and in the same degree,  
“ affecting the entire Confederation.

“ On the other hand, the Confederated States bind them-  
“ selves not to give cause for any provocation on the part of  
“ Foreign Powers, or to exercise any towards them. In case  
“ any Foreign State shall make a well-grounded complaint  
“ to the Diet of an alleged wrong committed on the part of  
“ any member of the Confederation, the Diet shall require  
“ such member to make prompt and satisfactory reparation,  
“ and take other necessary measures to prevent the disturb-  
“ ance of the public peace.

“ Art. 37. Where differences arise between a Foreign  
“ Power and any State of the Confederation, and the inter-  
“ vention of the Diet is claimed by the latter, that body shall  
“ examine the origin of the controversy, and the real state of  
“ the question. If it results from this examination that such  
“ State has not a just cause of complaint, the Diet shall  
“ engage such State, by the most earnest representations, to  
“ desist from its pretensions, shall refuse its intervention,  
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“ serving peace. Should the examination prove the contrary,  
“ the Diet shall employ its good offices in the most efficacious  
“ manner, in order to secure to the complaining party com-  
“ plete satisfaction and security.

“ Art. 38. Where notice received from any member of  
“ the Confederation, or other authentic information, renders  
“ it probable that any of its States, or the entire Confede-  
“ ration, are menaced with a hostile attack, the Diet shall  
“ examine into and pronounce without delay upon the ques-  
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“ in the affirmative, shall adopt the necessary measures of  
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“ This resolution and the consequent measures are deter-  
“ mined in the Permanent Council by a plurality of votes.

“ Art. 39. When the territory of the Confederation is  
“ actually invaded by a Foreign Power, the state of war is

“ The Governments of \* \* \* now agree to maintain the same liberty to all national or commercial vessels, whatever may be their flag and without any exception, it being understood that national ships will be subject to the measures which the territorial authority may take to prevent ships in transit from disembarking on Egyptian territory any troops or munitions of war.”

*“ The Earl of Derby to Mr. Layard.*

“ Foreign Office, May 16.

“ Sir,—I transmit to your Excellency herewith a copy of a despatch which I have addressed to her Majesty’s Ambassador at Paris, respecting a project, of which a copy is also inclosed, communicated to me by M. de Lesseps, for the neutralization of the Suez Canal.

“ Your Excellency will see that Her Majesty’s Government have declined to adopt that project, but have informed M. de Lesseps of the intimation made by her Majesty’s Government to the Russian Ambassador that an attempt to blockade or otherwise to interfere with the Canal or its approaches would be regarded by her Government as a menace to India, and as a grave injury to the commerce of the world, and that on both these grounds any such step—which her Majesty’s Government hope and fully believe there is no intention on the part of either belligerent to take—would be incompatible with the maintenance by her Majesty’s Government of an attitude of passive neutrality.

“ I have to request your Excellency to acquaint the Porte with the intimation thus conveyed to the Russian Government, and to state that her Majesty’s Government will expect that the Porte and the Khedive will, on their side, abstain from impeding the navigation of the Canal, or adopting any measures likely to injure the Canal or its approaches, and that her Majesty’s Government are firmly determined not to permit the Canal to be made the scene of any combat or other warlike operations.

“ I have addressed a similar despatch to her Majesty’s  
“ Agent and Consul-General in Egypt. I am, &c.

“ DERBY.”

The Suez Canal was not blockaded during the war, but it would be difficult to deny that if Russia, against whom the Khedive had furnished his quota of troops acting in the Ottoman army, had thought fit to adopt this mode of harassing her belligerent, she would not have been within her right in so doing. Custom and prescription indeed, as well as positive agreement, may clothe with the sanction of International Law such a position as England has assumed : a positive international agreement may effect this end more speedily. But it cannot be admitted that the might of one State can make the right in this matter. England also declared that she would not allow the Canal to be the scene of any combat or warlike operation. But she did not assert or imply that both the public and private ships of Russia would not be entitled to what Jurists call an *innocent passage* through the Canal. It was implied that, once in the Canal, all ships would be in neutral waters, but it was not denied that either belligerent might prevent the other from entering this neutral spot by combat in the open sea constituting the approach to the canal (*k*).

The neutrality of the Persian Gulf was, I believe, declared by Russia.

(*k*) Question put by Sir W. Harcourt in the House of Commons, June 7, 1877.

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“ established by the fact of invasion ; and whatever may be  
“ the ultimate decision of the Diet, measures of defence, pro-  
“ portioned to the extent of the danger, are to be imme-  
“ diately adopted.

“ Art. 40. In case the Confederation is obliged to declare  
“ war in form, this declaration must proceed from the  
“ general assembly determining by a majority of two-thirds  
“ of the votes.

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“ claring the reality of the danger of a hostile attack renders  
“ it the duty of all the Confederated States to contribute to  
“ the measures of defence ordained by the Diet. In like  
“ manner, the declaration of war, pronounced in the general  
“ assembly of the Diet, constitutes all the Confederated  
“ States active parties to the common war.

“ Art. 42. If the previous question concerning the exist-  
“ ence of the danger is decided in the negative by a majority  
“ of votes, those of the Confederated States who do not con-  
“ cur in the decision of the majority, preserve the right of  
“ concerting between themselves measures of common de-  
“ fence.

“ Art. 43. Where the danger and the necessary measures  
“ of defence are restricted to certain States only of the Con-  
“ federation, and either of the litigating parties demands the  
“ mediation of the Diet, the latter body may, if it deems the  
“ proposition consistent with the actual state of things, and  
“ with its own position, and if the other party consents,  
“ accept the mediation ; provided that no prejudice shall re-  
“ sult to the prosecution of the general measures for the  
“ security of the territory of the Confederation, and still less  
“ any delay in the execution of those already adopted for  
“ that purpose.

“ Art. 44. War being declared, each Confederated State  
“ is at liberty to furnish for the common defence a greater  
“ amount of forces than is required as its legal contingent ;  
“ but this augmentation shall not form the ground of any  
“ claim for indemnity against the Confederation.

“ Art. 45. Where in case of war between Foreign Powers, or other circumstances, there is reason to apprehend a violation of the neutral territory of the Confederation, the Diet shall adopt without delay, in the Permanent Council, such extraordinary measures as it may deem necessary to maintain this neutrality.

“ Art. 46. Where a Confederated State, having possessions without the limit of the Confederation, undertakes a war in its character of a European Power, the Confederation, whose relations and obligations are unaffected by such war, remains a stranger thereto.

“ Art. 47. Where such State finds itself menaced, or attacked, in its possessions not included in the Confederation, the latter is not bound to adopt defensive measures, or to take any active part in the war, until the Diet has recognized in the Permanent Council, by a plurality of votes, the existence of a danger threatening the territory of the Confederation. In this last case, all the provisions of the preceding articles are equally applicable.

“ Art. 48. The provision of the Federal Act, according to which, when war is declared by the Confederation, none of its members can commence separate negotiations with the enemy, nor sign a treaty of peace or armistice, is equally applicable to all the Confederated States, whether they possess or not dominions without the territories of the Confederation.

“ Art. 49. In case of negotiations for the conclusion of a peace or armistice, the Diet shall confide the special direction thereof to a select committee named by that body, and shall appoint plenipotentiaries to conduct the negotiations according to instructions, with which they shall be furnished. The acceptance and confirmation of a treaty of peace can only be pronounced in the general assembly ” (i).

(i) *Martens, Nouveau Recueil*, tom. v. pp. 467-501 ; *De M. et de C.* i. p. 403 ; *Wheaton's Law of Nations*, pp. 457-460 ; *Relations of the Duchies of Schleswig and Holstein*.—*Twiss*, p. 111 ; *Zachar.* ib. 111, s. 261.



CVIII. The Federal Constitution was modified by a decree of the Diet at Frankfort (October 30) 1832, and still further by an Act of 1834; but these modifications, whether desirable or not, were pronounced by the British Minister for Foreign Affairs to involve no point which concerned the foreign relations of the different States with other States, and, therefore, not to found any just ground for their interference (*j*). But in 1834 the British Minister at the Germanic Diet protested against the occupation of Frankfort by Austrian and Russian troops as a violation of the Treaty of Vienna, and said, "The Germanic Confederation has been created by the Treaty of Vienna; and, as to its relations with other States, the rights of the Confederation, its powers, and its obligations, are to be sought for in the Stipulations alone" (*k*).

It would not be within the limits of this work to describe the various attempts made to remodel the Germanic Confederation, extending from the month of February 1848 to May 15, 1851. The end of the revolutionary agitation which distracted Germany during this period was the restoration of the Frankfort Diet as it had existed since 1815 (*l*).

CIX. From what has been already stated, and up to this epoch, the following propositions appear to be legitimately deduced:—

First. That the Germanic Confederation maintained with those who were members of that league relations of a special International character, resting entirely upon the Federal Act of 1815, and further explained by that of 1820, as their sole foundation; but that all the members of this league were

(*j*) *Wheaton's History*, 460, 468, 470, 472, 483. *Mr. Bulwer's Speech in the House of Commons*, August 2, 1832; and *Lord Palmerston's Reply*.—*Hansard's Parliamentary Debates* (third series), vol. xiv. pp. 1020–1049.

(*k*) *Zachariä*, ib. B. iii. Kap. iii. s. 256: "Streitigkeiten über Auslegung und Anwendung der Verfassung."—*Bundesschiedsgericht von 1834. The Relation of Schleswig and Holstein*, by Dr. *Twiss*, p. 110; 1 *Wheaton, Elém.*, p. 65.

(*l*) *Annual Register*, vol. xciii. p. 277.

governed in their relations with other Independent States by the general International Law.

Secondly. That the mutual rights and duties of the members of this Confederation were wholly distinct from those which existed between them and other States, not members of the Confederation.

Thirdly. That the operation of the duties and rights growing out of the constitution of the Confederation was not only exclusively confined to the Independent Sovereigns who were members of it, but also to the territories which belonged to them, by virtue of which they were originally incorporated into the Germanic Empire (*m*).

Fourthly. That the admission of new States, *not being German*, into the Confederation, or the admission of States *not sovereignties*, would have conflicted with the principle and the objects of the Confederation (*n*).

If these propositions be sound in point of law and reason, it follows that neither territories belonging to these sovereigns at that time, nor subsequently acquired territories, could have been engrafted into this Confederation without the consent of other nations, especially of those who were parties to the Treaty of Vienna.

CX. The events of our own day have called for very important practical applications of these principles: first, in the case of the Duchies of Schleswig and Holstein (*o*), as to the relation in which they stood to the Crown of Denmark on the one hand, and to the Germanic Confederation on the other: Schleswig having been a fief of the Danish Crown from the period of its first creation as a Duchy up to the year 1658, and having since that time been annexed to the Gottorp Duchy, and having been afterwards re-annexed with Gottorp

(*m*) Zachariä, ib. Band iii. s. 219: "Begriff und Zweck des Deutschen Bundes."

(*n*) Zachariä, ib. s. 222.

(*o*) *The Relations of the Duchies of Schleswig and Holstein to the Crown of Denmark and the Germanic Confederation*, by Dr. Twiss, chap. v. p. 103.

to Denmark, and never having been directly connected with the German Empire; Holstein, on the contrary, having been a German fief.

Those who argued for the German side (as it was called) of the question, contended, that because the King of Denmark was subject, as Duke of Holstein, to the laws of the Confederation with respect to that Duchy, therefore his Duchy of Schleswig was also subject to the same condition. It was answered irresistibly, it would seem, so far as justice, practice, and the reason of thing are concerned, that it might as well be said that his province of Jutland was subject to the Confederation; that the King of Holland, by reason of his Duchy of Luxemburg, had not subjected Belgium to the Confederation; and that the members of it had not pretended to interfere as to the separation of Belgium from Holland, though they had done so as to the arrangements with respect to the Duchy of Luxemburg. On the establishment of the Kingdom of Belgium, Luxemburg was divided, half being given to Belgium, and half remaining to Holland; the German Confederation being at first compensated by the admission into its membership of the newly-created Duchy of Limburg (*p*). Another case which gave rise to a discussion as to the practical application of the principles of the German Confederation was the alleged attempt or desire of Austria to incorporate her Hungarian, Croatian, and Italian dominions into the German Confederation; to which attempt the Powers who guaranteed the Treaty of Vienna had an unquestionable right to refuse their consent, and which right they might hold themselves bound by their obligations, both with respect to themselves and to the general peace of the world, to exert (*q*).

CXI. (4) We have now arrived at the penultimate resolution of the Germanic Confederation. In its relation

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(*p*) Zachariä, ib. s. 221, II. D.

(*q*) See the note on this subject of the French and English to the Austrian Government in the Appendix to the second volume of the *Annuaire*, 1852-3, by the editors of the *Revue des Deux Mondes*.

to Foreign States, it had been of little practical importance since the Treaty of Vienna. This was owing to the constant rivalry between the two greatest members of it, Austria and Prussia—a rivalry which was terminated in 1866, in a manner which had not been foreseen or expected by the European Powers, although the outbreak of democracy, in the years 1848 and 1849, had ended in greatly strengthening the power and authority of Prussia. In 1863 the Emperor of Austria convened the German Sovereigns at Frankfort to consider the form of the Federal Union. Prussia refused to take any part in this convention, and at that time probably began to prepare, in secret, the first steps for obtaining the supremacy for herself over the German Confederacy, and for excluding Austria from all future participation therein. After the death of the King of Denmark, the claims of the German people with respect to the Duchies of Holstein and Schleswig ought to have been enforced, if they were founded upon justice, by the intervention (*r*) of the Diet; but Austria was induced by Prussia, under the pretext of restraining democracy, to participate with her in the invasion of Denmark. From that moment, Prussia saw her way to expel Austria from the supremacy in Germany, which she intended to obtain for herself.

In 1864 “much-wronged Denmark” (*s*), left alone without allies, was compelled, by the overwhelming military forces of Austria and Prussia, to cede to them the Duchies of Schleswig, Holstein, and Lauenburg (*t*).

A dispute rapidly arose between Austria and Prussia with respect to the right of succession to the Duchies of Schleswig and Holstein. This right they had both previously recognized as being vested in the hereditary Prince of Augustenburg. Prussia soon showed the determination, which she afterwards executed, of annexing to her own territories the

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(*r*) By what was technically termed “a Federal execution.”

(*s*) *Sir A. Malet, Overthrow of the Germanic Confederation*, p. 385; see also p. 20.

(*t*) See Article iii. Treaty of Vienna, Oct. 30, 1864.

**Elbe Duchies.** The other Powers of Europe did not interfere, otherwise than by diplomatic remonstrance, to maintain the public law of Europe, as contained in the Treaties of 1815 upon this question. The Diet attempted to intervene, but Prussia denied its competence, and refused to be bound by its jurisdiction. On August 14, 1865, the Treaty of Gastein embodied a sort of compromise between Austria and Prussia, whereby the former was to take Holstein and the latter Schleswig. But this treaty did not avail to prevent an open breach between these two Great Powers, which shortly afterwards took place. The Diet again, in vain, attempted to intervene. Prussia allied herself with Italy, and a war with Austria ensued. In this war the Diet endeavoured to support its rights, by bringing into the field an army composed of the troops of divers Federal States. Bavaria, Hanover, and Saxony became the allies of Austria. The result is well known. Prussia, by her superior military organization, and the important aid of Italy, obtained, in 1866, a complete victory over her rival. The Treaty of Prague was signed on August 23, 1866, between the two Powers, the exact contents of which, so far as they affect the present question, have been already mentioned; but I will state here the general conclusion, in the language of the most recent, and certainly not the least competent, historian of the Germanic Confederation:—

“ The peace agreed on at Nicolausberg was signed at  
“ Prague, and ratified on July 30. The dissolution of  
“ the Germanic Confederation was thereby recognized, and  
“ Austria, engaging to abstain from all interference in  
“ the reconstruction of Germany, gave her assent before-  
“ hand to all such territorial changes as Prussia saw fit to  
“ make, on the sole condition that Saxony should remain  
“ intact. Austria likewise ceded all pretensions to condo-  
“ minate right with Prussia in the Elbe Duchies, stipulating,  
“ however, that North Schleswig should be entitled to vote  
“ upon the question of eventual re-union with Denmark.

“ Saxony it was decided should be united to the North

“German Confederation; and special arrangements as to the army, the police, and post-office were made with that Government, which left King John few remains of independence or royal prerogative, excepting the right of imposing taxes on his subjects.

“Prussia took possession of Hanover, Electoral Hesse, Nassau, and the formerly free city of Frankfort-on-Main, as well as of Schleswig and Holstein, besides the territorial cessions made by Bavaria and Grand-Ducal Hesse, in full sovereignty; and here it may be remarked that, in spite of many remonstrances, the article of the Treaty of Prague relating to the vote of North Schleswig for re-union with Denmark remains to this day” (the author writes in 1870) “unexecuted” (u).

Since the author wrote these remarks, and in the present year (1879), this article has been abrogated by a convention between the two Powers.

Germany next presented a new International aspect to Foreign States—a North German Confederation, diplomatically represented as such, but really under the absolute control of Prussia; and Southern States, not formed as yet into a South German Confederation, but of which Austria was the most powerful State.

With respect to Northern Germany, a treaty of confederation was entered into between the Governments of Prussia, Saxe-Weimar, Oldenburg, Brunswick, Saxe-Altenburg, Saxe-Coburg-Gotha, Anhalt, Schwarzburg-Sondershausen, Schwarzburg-Rudolstadt, Waldeck, Reuss (of the younger line), Schaumburg-Lippe, Lippe, Lübeck, Bremen, and Hamburg. By this treaty it was agreed that a confederate constitution should be adopted by a German Parliament, and the troops of the confederates were to be under the supreme command of the King of Prussia. They mutually agreed to maintain “the inde-

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(u) *The Overthrow of the Germanic Confederation by Prussia in 1866*, p. 380, by Sir Alexander Malet, late H.M. Envoy Extraordinary and Minister Plenipotentiary at Frankfort.

“pendence and integrity” of the contracting States, and guaranteed the defence of their territories (x).

The enormous military preponderance which Prussia thus obtained, not only in Germany, but in Europe, and the complete disturbance of the previously existing balance of power, are obvious and indisputable facts; but the matter did not rest here, for in 1867 it was discovered that she had concluded a secret treaty, identical in its provisions, with the four States of Bavaria, Würtemberg, Baden, and Hesse-Darmstadt. It was, in its fullest sense, an offensive and defensive alliance with each of them, with the peculiar feature of placing the whole military force of each State under the orders of the King of Prussia in case of war (y). The formidable use which could be made of this treaty was speedily shown in the war which broke out between Prussia and France in 1870.

An important though unexpected result of this war was the complete blending of the Northern and Southern States of Germany. The Southern States joined in the war against France, and in November 1870, following the lead of Baden and Hesse, they all became members of the German Confederation.

Not long after this event the King of Bavaria urged the King of Prussia to re-establish the German Empire. The North German Bund took cognizance of the matter, and resolved that the Empire should be restored, and the King of Prussia declared hereditary Emperor of Germany. The King accepted the proffered dignity and was proclaimed Emperor at Versailles whilst prosecuting the war against France.

The present Constitution of the German Empire was promulgated at Berlin on April 16, 1871, the principal features of which are as follows:—

(x) *Ann. Reg.* 1866, p. 247. See also *Ann. Reg.* 1868, p. 220.

(y) See *Sir Alexander Mallet's Overthrow of the Germanic Confederation*, pp. 376-7.

## CONSTITUTION OF THE GERMAN EMPIRE (2).

CXIA. "The King of Prussia, in the name of the North German Confederation; the Kings of Bavaria and Würtemberg; the Grand Duke of Baden, and the Grand Duke of Hesse for those parts of the Grand Duchy of Hesse which are south of the river Main: conclude an everlasting Confederation for the protection of the territory of the Confederation and the rights thereof, as well as to care for the welfare of the German people."

This Confederation will bear the name 'German Empire' and is to have the following Constitution:—

## "I. TERRITORY OF THE CONFEDERATION.

"ART. I. The territory of the Confederation is composed of the States of Prussia with Lauenburg, Bavaria, Saxony, Würtemberg, Baden, Hesse, Mecklenburg-Schwerin, Saxe-Weimar, Mecklenburg-Strelitz, Oldenburg, Brunswick, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Anhalt, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck, Reuss (elder line), Reuss (younger line), Schaumburg-Lippe, Lippe, Lübeck, Bremen, and Hamburg.

## "II. LEGISLATION OF THE EMPIRE.

"ART. II. Within this Confederate territory the Empire exercises the right of legislation according to the tenor of this Constitution, and with the effect that the Imperial laws take precedence of the laws of the States. The Imperial laws receive their binding power by their publication in the name of the Empire, which takes place by means of an Imperial Law Gazette. If the date of its first coming into force is not otherwise fixed in the published law, it comes into force on the fourteenth day after the close of the day on which the part of the

(2) *Hertslet's Map of Europe by Treaty*, vol. iii. p. 1031. *et seq.* April 16, 1871, Berlin.



“Imperial Law Gazette which contains it is published at  
“Berlin.

“ART. III. For entire Germany one common nation-  
“ality exists, with the effect that every person (subject,  
“state-citizen) belonging to any one of the Confederated  
“States is to be treated in every other of the Confederated  
“States as a born native, and accordingly must be per-  
“mitted to have a fixed dwelling, to trade, to be appointed  
“to public offices, to acquire real-estate property, to obtain  
“the rights of a state-citizen, and to enjoy all other civil  
“rights under the same presuppositions as the natives, and  
“likewise is to be treated equally with regard to legal prose-  
“cution or legal protection.

“No German may be restricted from the exercise of this  
“right by the authority of his own State, or by the authority  
“of any of the other Confederated States.

“Those regulations which have reference to the care of  
“the poor, and their admission into local parishes, are not  
“affected by the principles set down in the first paragraph.

“Until further notice the treaties likewise remain in  
“force which have been entered into by the particular  
“States of the Confederation regarding the reception of per-  
“sons expelled, the care of sick persons and the burial of  
“deceased persons belonging to the States.

“What is needful for the fulfilment of military duty in  
“regard to the native country will be ordered by the way  
“of Imperial legislation.

“Every German has the same claim to the protection of  
“the Empire with regard to foreign nations.

“ART. IV. The following affairs are subject to the  
“superintendence and legislation of the Empire.

“1. The regulations as to freedom of translocation,  
“domicile, and settlement affairs, right of citizenship, pass-  
“port and police regulations for strangers, and as to trans-  
“acting business, including insurance affairs, in so far as  
“these objects are not already provided for by Article III.  
“of this Constitution. In Bavaria, however, the domicile

“and settlement affairs, and likewise the affairs of colonization and emigration to foreign countries, are herefrom excluded.

“2. The Customs and Commercial legislation and the taxes which are to be applied to the requirements of the Empire.

“3. The regulation of the system of the coinage, weights and measures, likewise the establishment of the principles for the issue of funded and unfunded paper money.

“4. The general regulations as to banking.

“5. The granting of patents for inventions.

“6. The protection of intellectual property.

“7. The organization of the common protection of German commerce in foreign countries, of German vessels and their flags at sea, and the arrangement of a common consular representation, which is to be salaried by the Empire.

“8. Railway affairs, excepting in Bavaria the arrangements in Article XLVI., and the construction of land and water communications for the defence of the country and for the general intercourse.

“9. The rafting and navigation affairs on waterways belonging in common to several of the States, and the condition of the waterways, and likewise the river or other water dues.

“10. Postal and telegraph affairs; in Bavaria and Würtemberg, however, only with reference to the provisions of Article LII.

“11. Regulations as to the reciprocal execution of judgments in civil affairs and the settlement of requisitions in general.

“12. Likewise as to the verification of public documents.

“13. The general legislation as to obligatory rights, penal law, commercial and bill of exchange laws, and judicial procedure.

“14. The military and naval affairs of the Empire.

“ 15. The measures of medicinal and veterinary police.

“ The regulations for the press and for union societies.

“ ART. V. The legislation of the Empire is carried on  
“ by the Council of the Confederation and the Imperial  
“ Diet. The accordance of the majority of votes in both  
“ assemblies is necessary and sufficient for a law of the  
“ Empire.

### “ III. COUNCIL OF THE CONFEDERATION.

#### “ *Committee for Foreign Affairs.*

“ ART. VI. The Council of the Confederation con-  
“ sists of the representatives of the members of the Con-  
“ federation, amongst which the votes are divided in such a  
“ manner that—

	Votes
Prussia has (with the former votes of Hanover, Electoral Hesse, Holstein, Nassau, and Frankfort) . . . . .	17
Bavaria . . . . .	6
Saxony . . . . .	4
Württemberg . . . . .	4
Baden . . . . .	3
Hesse . . . . .	3
Mecklenburg-Schwerin . . . . .	2
Saxe-Weimar . . . . .	1
Mecklenburg-Strelitz . . . . .	1
Oldenburg . . . . .	1
Brunswick . . . . .	2
Saxe-Meiningen . . . . .	1
Saxe-Altenburg . . . . .	1
Saxe-Coburg-Gotha . . . . .	1
Anhalt . . . . .	1
Schwarzburg-Rudolstadt . . . . .	1
Schwarzburg-Sondershausen . . . . .	1
Waldeck . . . . .	1
Reuss (elder line) . . . . .	1
Reuss (younger line) . . . . .	1
Schaumburg-Lippe . . . . .	1
Lippe . . . . .	1
Lübeck . . . . .	1
Bremen . . . . .	1
Hamburg . . . . .	1
Total . . . . .	58

“Each member of the Confederation can nominate as many plenipotentiaries to the Council of the Confederation as it has votes, but the totality of such votes can only be given in one sense.

“ART. VII. The Council of the Confederation determines :

“1. What Bills are to be brought before the Imperial Diet, and on the resolutions passed by the same.

“2. As to the administrative measures and arrangements necessary for the general execution of the Imperial legislation, in so far as no other Imperial law has decreed to the contrary.

“3. As to defects which have made themselves manifest in the execution of the Imperial laws or the above-mentioned measures and arrangements.”

ART. VIII. provides for the formation of Committees, including a Committee for foreign affairs, of which Bavaria is Chairman.

“ART. IX. Every member of the Council of the Confederation has the right to appear in the Imperial Diet, and must at his desire at all times be heard in order to represent the views of his Government, even when these views have not been adopted by the majority of the Council of the Confederation and of the Imperial Diet.

“ART. X. The Emperor is bound to afford the usual diplomatic protection to the members of the Council of the Confederation.

“IV. THE PRESIDENCY : KING OF PRUSSIA, GERMAN EMPEROR. RIGHT TO DECLARE WAR ; TO MAKE PEACE ; TO CONCLUDE TREATIES WITH FOREIGN POWERS, AND TO SEND AND RECEIVE AMBASSADORS.

“ART. XI. The Presidency of the Confederation belongs to the King of Prussia, who bears the name of German Emperor.

“ The Emperor has to represent the Empire internationally, to declare war, and to conclude peace in the name of the Empire, to enter into alliances, and other treaties with Foreign Powers, to accredit and to receive Ambassadors.

“ The consent of the Council of the Confederation is necessary for the declaration of war in the name of the Empire, unless an attack on the territory or the coast of the Confederation has taken place.

“ In so far as treaties with Foreign States have reference to affairs which according to Article IV. belong to the jurisdiction of the Imperial Legislation, the consent of the Council of the Confederation is requisite for their conclusion, and the sanction of the Imperial Diet for their coming into force.

“ ART. XII. The Emperor has the right to summon, to open, to prorogue, and to close both the Council of the Confederation and the Imperial Diet.

“ ART. XIII. The summoning of the Council of the Confederation and of the Imperial Diet takes place once each year, and the Council of the Confederation can be called together for the preparation of business without the Imperial Diet being likewise summoned, whereas the latter cannot be summoned without the Council of the Confederation.

“ ART. XIV. The Council of the Confederation must be summoned whenever one-third of the votes require it.

“ ART. XV. The Presidency in the Council of the Confederation and the direction of the business belongs to the Chancellor of the Empire, who is to be appointed by the Emperor.

“ The Chancellor of the Empire can be represented, on his giving written information thereof, by any other member of the Council of the Confederation.

“ ART. XVI. The requisite motions in accordance with the votes of the Council of the Confederation will be brought before the Imperial Diet in the name of the Em-

“peror, where they will be supported by members of the  
 “Council of the Confederation, or by particular Commis-  
 “sioners nominated by the latter.

“ART. XVII. The expedition and proclamation of the  
 “laws of the Empire, and the care of their execution, be-  
 “long to the Emperor.

“The orders and decrees of the Emperor are issued in  
 “the name of the Empire, and require for their validity the  
 “counter-signature of the Chancellor of the Empire, who  
 “thereby undertakes the responsibility.

“ART. XVIII. The Emperor nominates the Imperial  
 “officials, causes them to be sworn for the Empire, and  
 “when necessary decrees their dismissal.

“The officials of any State of the Confederation, when  
 “appointed to any Imperial office, are entitled to the same  
 “rights with respect to the Empire as they would enjoy from  
 “their official position in their own country, excepting in  
 “such cases as have otherwise been provided for by the  
 “Imperial legislation before their entrance into the Imperial  
 “service.

“ART. XIX. Whenever members of the Confedera-  
 “tion do not fulfil their constitutional duties toward the  
 “Confederation they may be constrained to do so by way of  
 “execution.

“Such execution must be decreed by the Council of the  
 “Confederation, and be carried out by the Emperor.

#### “V. IMPERIAL DIET.

“ART. XX. The Imperial Diet is elected by universal  
 “and direct election with secret votes. . . .

“ART. XXII. The proceedings of the Imperial Diet  
 “are public. . . .

“ART. XXIV. The legislative period of the Imperial  
 “Diet is three years. For a dissolution of the Imperial  
 “Diet within this time, a resolution of the Council of the  
 “Confederation, with the assent of the Emperor, is re-  
 “quisite. . . .

“ART. XXVIII. The Imperial Diet decides by absolute majority of votes. The presence of a majority of the legal number of the members is necessary for the validity of a resolution. . . .

“ART. XXIX. The members of the Imperial Diet are representatives of the entire people, and are not bound by orders or instructions. . . .

#### “VI. CUSTOMS AND COMMERCIAL AFFAIRS.

“ART. XXXIII. Germany forms one Customs and Commercial territory, encircled by a common Customs frontier. Those separate parts of territory are excluded, which, from their position, are not adapted for inclusion in the Customs frontier. . . .

“ART. XXXIV. The Hanseatic Towns, Bremen and Hamburg, with so much of their own or of the adjacent territory as may be needful for the purpose, remain as free ports outside the common Customs frontier, until they apply to be admitted therein. . . .

#### “XIV. GENERAL STIPULATIONS.

“ART. LXXVIII. Alterations in the Constitution take place by way of legislation. They are considered as rejected if they have fourteen votes in the Council of the Confederation against them. Those provisions of the Constitution of the Empire by which certain rights are established for separate States of the Confederation in their relation to the community can only be altered with the consent of the State of the Confederation entitled to those rights.”

CXIb. The learned Dr. Franz von Holtzendorff thus sums up the leading points of differences between the new and the old Constitutions:—

“The principal differences of the new Constitution of the Empire compared with the former Constitution of the North German Confederation (by which in other respects the continuity of the state of things existing in 1866 and

“ 1867 was in no wise interrupted) are these: the increase  
 “ of the authority of the Imperial Diet with respect to the  
 “ press and associations; the limitation of the Emperor’s  
 “ prerogative by the necessity of obtaining the concurrence  
 “ of the Council of the Confederation (*bundesrätliche*  
 “ *Zustimmung*) in the matter of *Offensive War*; the recogni-  
 “ tion of the peculiar rights of the South German States in  
 “ certain affairs otherwise belonging to the authority of the  
 “ Empire, especially the separate position of Bavaria in the  
 “ administration of military affairs; the increase of the autho-  
 “ rity of the decisions of the Council of the Confederation  
 “ by the establishment of an especial Committee for Foreign  
 “ Affairs under the presidency of Bavaria; the increased  
 “ difficulty in making changes in the Constitution, which can  
 “ now be negatived by fourteen voices in the Council of the  
 “ Confederation, whereas, according to the law of the North  
 “ German Confederation, a majority of two-thirds was suffi-  
 “ cient to carry the proposal; lastly, the recognition of the  
 “ *jura singulorum* in the sense of the law of the old Confede-  
 “ ration of 1815, so that the privileges granted to individual  
 “ States could only be taken away with their concur-  
 “ rence” (a).

CXII. The second class of Federal States embraces those which (b), by the terms of their confederation, vest the adjustment of their external relations in a Supreme Federal Power. (*Unio civitatum—Etat composé—Bundes-*

(a) *Encyklopädie der Rechtswissenschaft*, p. 800.

(b) “In these days, their union is so entire and perfect, that they are not only joined together in bonds of friendship and alliance, but even make use of the same laws, the same weights, coins, and measures, the same magistrates, counsellors, and judges; so that *the inhabitants of this whole tract of Greece seem in all respects to form but one single city*, except only that they are not enclosed within the circuit of the same walls; in every other point, both through the whole Republic and in every separate State, we find the most exact resemblance and conformity.”—*Hampton’s Polybius*, vol. i. p. 224.

*Polyb. Hist.* l. ii. c. iii.; *Bynkershoek, Quæst. Jur. Publ.* l. ii. c. xxiv.

*Burlamaqui, Principes du Droit politique*, pt. ii. ch. i. s. 43.

*The Federalist (American)*.



*staat—unirte Staaten — Staaten-Vereine*). The Achæan League and the United Provinces of the Netherlands furnish memorable illustrations of such a confederation (c).

CXIII. To this denomination belongs, at the present day, the Confederation of the Swiss Cantons (d). The *Thirteen* Cantons of Switzerland had for some time previous to the Treaty of Westphalia been *de facto* independent (e), but that Treaty formally recognized their existence as Independent States. The effects of the French Revolution in 1789 were severely felt in Switzerland. The Cantons, in consequence of the separation of various districts, were increased, first, to the number of nineteen, and finally to the number of twenty-two. Their internal dissensions brought about an Act of Mediation under Buonaparte in 1803, and subjected them to the invasion of the Allied Powers in 1813.

In 1815 the claims of the conflicting Cantons were adjusted, and the Confederation re-modelled at the Congress of Vienna; and in the same year (August 7) the number of the Cantons was increased to twenty-two by the Federal Act, signed at Zürich, and their neutrality was recognized (November 20) by an Act signed by the Allied Powers at Paris.

CXIV. According to the Federal Act of 1815, the Swiss Confederation consisted of the union of twenty-two Cantons.

(c) *Manuel du Droit public de la Suisse.*

*Handbuch der Schweizerischen Staaten.*

*Wheaton, Elém. du Droit intern.* l. i. pp. 72, 73.

*Wheaton, Hist.* pp. 492-496.

(d) See *Martens, Nouv. Rec.* t. ii. p. 68; t. iv. pp. 161, 273; t. vii. p. 173; and *De M. et de C.* t. iii. pp. 14, 38, 89, 197, 242, for the following treaties relating to the Swiss Confederation:—"1814. Paix de Paris, Art. vi. 3. La Suisse indépendante continuera de se gouverner par elle-même." "1814, 16 août. Les *Dix-neuf* Cantons, Traité d'alliance pour la conservation de leur liberté et indépendance." "1815, 7 août. Acte de Confédération entre les *Vingt-deux* Cantons helvétiques, signé à Zurich." "1815, 20 novembre. Acte signé à Paris par les plénipotentiaires d'Autriche, de France, de la Grande-Bretagne, de Prusse, et de Russie, par lequel la neutralité de la Suisse a été reconnue."

(e) *Koch, Hist. des Tr.* i. iii.

The object of their union was declared to be the preservation of their liberty and independence, security against foreign invasion, and the maintenance of internal public tranquillity and order. They mutually guaranteed their respective territories and constitutions. Their Diet was formed by a Congress of Deputies, one being delegated from each Canton, and each having equally a single voice in the deliberations of this common senate. It assembled every year, alternately, at Berne, Zürich, and Lucerne—these being the Cantons (*Vorort*) in which the executive power of the Confederation resided when the Diet was not actually sitting. The Diet had the exclusive power of declaring war, of entering into treaties of peace, commerce, and alliance with Foreign States. These negotiations, however, required the assent of three-fourths of the Diet, though in other matters a simple majority sufficed for the validity of the resolution.

It was competent, however, to each Canton separately to conclude with Foreign Powers treaties which had for their object regulations of revenue and police; provided always that they did not conflict with the Federal Convention, the existing Alliances, or the Constitutional Rights of other Cantons. The Confederation had a common army and treasure, supported by levies of men and contributions of money, according to fixed proportions, from each Canton.

The Diet was responsible for the internal and external security of the Confederation. It appointed the commanding officers, and directed the operations of the Federal army, and moreover nominated the Federal Ministers at Foreign Courts.

CXV. Since the year 1830 the separate constitution of each of the Cantons has received a more or less democratic modification. Bâle, Unterwalden, and Appenzell have been subdivided, and the subdivisions added to the number of the Confederated Cantons, which is thereby increased to twenty-five; but the number of votes in the Diet was still limited to twenty-two, each division of these three Cantons enjoying only half a vote.

CXVA. The last revision of the Swiss Federal Constitution took place in 1874.

By the Constitution then framed, the peoples of the twenty-two Cantons are united into a Confederation, the objects of which are declared to be the security of the national independence, the maintenance of internal tranquillity and order, the protection of the liberty and rights of the confederate peoples, and the increase of their common prosperity (Arts. 1, 2).

The Cantons are sovereign in so far as their sovereignty is not limited by the Federal Constitution, and exercise all the rights which are not delegated to the Federal authority (Art. 3). The Confederation guarantees the territory of the Cantons, their sovereignty within the limits already fixed, the liberty and the rights of the people, the constitutional rights of the citizens, as well as the rights and privileges conferred upon the authorities. The Cantonal Constitution must be republican (Arts. 5, 6).

Any special alliance or treaty of a political nature between two or more Cantons is forbidden; but conventions may be made, subject to the supervision of the Federal authority on matters of legislative administration and justice. The Confederation alone has the power of declaring war and making peace, and of making alliances and treaties with other nations; but individual Cantons may make treaties with other States as to matters of public economy (*économie publique*), the necessary relations between two neighbouring countries, and matters of police (Arts. 7, 8, 9).

Official intercourse between Cantons and foreign Governments or their representatives is carried on through the Federal Council (Art. 10).

The supreme authority is vested in the Federal Assembly, which consists of a National Council, elected by direct representation, one member for every 20,000 persons or fraction over 10,000 in each Canton; and a Council of Cantons, to which each Canton sends two members, the half-Canton one (Arts. 71, 72, 73, 80).

The superior executive authority is exercised by a Federal Council of seven, chosen by the Federal Assembly, one of whom is annually chosen President of the Confederation (Arts. 95, 96, 98).

The Federal Assembly decides among other matters as to alliances and treaties with Foreign States, and takes the measures necessary to preserve external security and the independence and neutrality of the country. It makes war and peace; disposes of the Federal army and the Federal budget (Art. 85).

The Federal Council is the executive authority for all these purposes (Art. 102).

A Federal tribunal is established to decide civil differences between the Confederation on the one hand, and particular Cantons, corporations, and individuals on the other; and similarly between two or more Cantons or between Cantons and corporations or individuals (Art. 110, 113).

It sits further with a jury as a criminal tribunal, to decide among other things cases of high treason against the Confederation, revolt or violence against the Federal authorities, and crimes and offences against the law of nations (Art. 112).

This Constitution is subject to revision; but the revised Constitution only acquires force when it has been voted by the majority of Cantons, and by the majority of Swiss citizens taking part in the voting (Arts. 118, 121).

The Constitution of 1874, it should be noticed, was not adopted without considerable differences of opinion. It was submitted to the popular vote; when 340,199 citizens voted for it, and 198,013 against it; 14½ Cantons voted for it, and 7½ against it (f).

Before the French Revolution, it was competent to each Canton to enter into a special alliance both with another

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(f) I desire to express my obligations to the present Agent and Consul-General of Switzerland, Mr. H. Vernet, for supplying me with an official copy of the *Constitution Fédérale de la Confédération Suisse* du 29 mai, 1874.

Canton and with a Foreign State (*g*); but it is clear, from what has been stated, that no individual member of this Federal Body, since the Federal Act of 1815, has the character and position—or, as civilians say, the *persona standi*—of a separate independent nation.

CXVI. This subject should not be dismissed without the observation, that one of the Swiss Cantons, Neuchâtel, formerly bore the title of a Principality, and was placed in some, though it may be doubtful in what, degree under the *Suzeraineté* of the King of Prussia (*h*).

After the death of Marie de Longueville, Duchess of Nemours, in 1707, the States of Neuchâtel transferred the fief of their principality to the King of Prussia, as the representative of the House of Châlons, with a reservation of their liberties and of their Treaties of Alliance with the Swiss Cantons.

The ninth article of the Treaty of Utrecht recognized this act of the States of Neuchâtel, and so the relations between Prussia and Neuchâtel continued till 1805, when Prussia ceded the Principality to Napoleon. It was restored, however, at the Peace of Paris, to Prussia, from whom, in 1814, it received a new constitutional form of government. But Neuchâtel was subsequently admitted into the new Helvetic

(*g*) *Merlin, Répertoire de Jurisprudence*, tit. "Ministre public."

*Wheaton, Elém.* i. pp. 73, 74. *Annuaire des Deux Mondes*, 1850, p. 294; 1851-2, p. 188.

(*h*) "Extrait du Manifeste publié par l'Ambassadeur du Roy de Prusse au sujet des affaires de Neufchâtel, 1707."—*Schmauss*, ii. p. 1205.

"Articles généraux dressés et proposés au nom, etc. de la Principauté de Neufchâtel et de Valangin—agréés et accordés par l'Ambassadeur de S. M. le Roy de Prusse, 1707."—*Ib.* p. 1209.

"Mémoire, etc., 1707."—*Ib.* pp. 1211, 1212.

"Articles accordés par le Roy de Prusse, Frédéric I, à la ville de Neufchâtel, 1707."—*Schmauss*, ii. p. 1213, in which the King of Prussia is described (p. 1217) as "Prince Souverain de Neufchâtel et Valangin."

In the *Treaty of Utrecht* (1713) the authority of the King of Prussia is fully recognized.—*Ib.* p. 1301, and p. 1309, art. ix. of that part of the treaty which concerns the relations of France and Prussia. The King of Prussia is acknowledged "*pro supremo Domino Principatûs Neocastri et Vallengia*."

Confederation, its relations to which were defined by the 9th article (i) of the *Acte* (April 7, 1815) which reunited Neuchâtel, Geneva, and Valais to the Helvetic Confederation, and declared that "the sovereign State of Neuchâtel is received as a Canton into the Swiss Confederation. This reception takes place under the express condition that the fulfilment of all the duties which devolve upon the State of Neuchâtel as a member of the Confederation, the participation of that State in deliberations on the general affairs of Switzerland, the ratification and performance of the resolutions of the Diet, shall exclusively concern the Government residing in Neuchâtel, without requiring any further sanction or assent."

CXVII. In 1847-8, Switzerland, like the rest of Europe, was agitated by a civil war, with respect to which the States of Neuchâtel resolved to maintain a strict neutrality. The King of Prussia supported them in this resolution; but the extreme party constituting the then majority in the Swiss Diet declared that this resolution was inconsistent with the terms of the stipulation by which Neuchâtel was incorporated into the union (j). After undergoing the evils of a revolutionary war, Neuchâtel returned to its ancient relations with Prussia (k). But in 1857 Prussia renounced her rights over this Principality, which became a member of the Helvetic Confederation.

(i) *Martens*, t. iv. pp. 168, 170: "Aufnahmsurkunde des Cantons Neuenburg."

(j) *Annuaire historique universel*, 1848-9, ch. viii. p. 515; *Suisse*, *Ib.* 1850, ch. vii. p. 487.

(k) "Neuchâtel ist seit dem Wiener Congress-Abschied ein souveräner (monarchischer) Schweizer Canton."—Note of *Morstadt* (1851) to his edition of *Klüber's Völkerrecht*.

*Annuaire des Deux Mondes*, 1850, p. 301.

## CHAPTER V.

## UNITED STATES OF NORTH AMERICA.

**CXVIII.** THE United States of North America (*a*) furnish the greatest example which the world has yet seen of a Federal Government.

The constitution of the United States of North America differs materially from that of the Germanic Confederation: the latter was a league of Sovereign States for their common defence against external and internal violence; the former is a Supreme Federal Government—it is, in fact, a Composite State, the constitution of which affects not only members of the Union, but all its citizens, both in their individual and in their corporate capacities (*b*).

According to the language of the Charter or Act of the Constitution, it was established by “the people of the United States, in order to form a more perfect union, “establish justice, ensure domestic tranquillity, provide for “the common defence, promote the general welfare, and “secure the blessings of liberty to them and their posterity.” The Legislative power of the Union is vested in a Congress, consisting of a Senate, the members of which are chosen by the local legislatures of the several States, and of a House of Representatives, chosen by the people in each State.

The Executive power is lodged in a President, chosen by electors appointed in each State according as the legislature

(*a*) *Wheaton's International Law; Story's Commentaries on the Constitution of the United States; Kent's Commentaries on American Law.*

(*b*) *Texas v. White, 7 Wallace's Reports in the Supreme Court, 560.*

thereof may direct. The powers of Congress and of the President, so far as they affect the International relations of the United States with other countries, are expressed in the following articles of the Constitution, which was finally ratified by the thirteen States in 1790 (c):—

ART. I.—Sect. 8.

CXIX. “1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

“2. To borrow money on the credit of the United States.

“3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

“4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.”

“10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

“11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water” (d).

Sect. 10.

“1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex-post-facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

“2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except

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(c) The Articles of the *Confederation* were finally ratified in 1781. It was superseded by the *Constitution* in 1790.

(d) *Story's Commentaries on the Constitution of the United States*, pp. xxi., xxii. of “The Constitution.”



“ what may be absolutely necessary for executing its inspection laws ; and the nett produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States ; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a Foreign Power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay ” (e).

## ART. II.—Sect. 2.

“ 2. The President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur ; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law : but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of Law, or in the heads of departments (f).

### Sect. 3.

“ 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both Houses, or either of them ; and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be

“faithfully executed, and shall commission all the officers of  
“the United States” (*g*).

### ART. III.—Sect. 1.

“1. The judicial power of the United States shall be  
“vested in one Supreme Court, and in such Inferior Courts  
“as the Congress may from time to time ordain and establish.  
“The judges, both of the Supreme and Inferior Courts, shall  
“hold their offices during good behaviour, and shall, at stated  
“times, receive for their services a compensation, which shall  
“not be diminished during their continuance in office” (*h*).

#### Sect. 2.

“1. The judicial power shall extend to all cases, in law  
“and equity, arising under this Constitution,—the laws of  
“the United States, and treaties made, or which shall be  
“made, under their authority; to all cases affecting ambas-  
“sadors, other public ministers, and consuls; to all cases of  
“Admiralty and maritime jurisdiction; to controversies to  
“which the United States shall be a party; to controversies  
“between two or more States, between a State and citizens  
“of another State, between citizens of different States,  
“between citizens of the same State claiming lands under  
“grants of different States, and between a State, or the  
“citizens thereof, and Foreign States, citizens or subjects (*i*).

“2. In all cases affecting ambassadors, other public  
“ministers, and consuls, and those in which a State shall be  
“a party, the Supreme Court shall have original jurisdiction.  
“In all the other cases before mentioned, the Supreme  
“Court shall have appellate jurisdiction, both as to law and  
“fact, with such exceptions and under such regulations as  
“the Congress shall make” (*j*).

### ART. IV.—Sect. 2.

“1. The citizens of each State shall be entitled to all  
“privileges and immunities of citizens in the several  
“States” (*k*).

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(*g*) *Story*, p. xxvi. (*h*) *Ib.* p. xxvii. (*i*) *Ib.* (*j*) *Ib.* p. xxviii. (*k*) *Ib.*

## Sect. 3.

“ 1. New States may be admitted by the Congress into  
 “ this Union, but no new State shall be formed or erected  
 “ within the jurisdiction of any other State, nor any State be  
 “ formed by the junction of two or more States, or parts of  
 “ States, without the consent of the legislatures of the States  
 “ concerned, as well as of the Congress ” (l).

It is remarkable that no provision on this subject is to be found in the Articles of the *Confederation* finally ratified in 1781. The contingency of the establishment of new States within the limits of the Union seems to have been wholly overlooked by the framers of the instrument of the Confederation. Under the provisions of the present article vast regions first organized as Territories have subsequently been admitted as States into the Union, upon an equality with the original States (m).

With respect to a “ Territory ” not yet admitted into the category of a State, the Supreme Court has laid down the law as follows:—

“ The United States, under its present Constitution,  
 “ cannot acquire territory to be held as a colony to be  
 “ governed at its will and pleasure. But it may acquire  
 “ territory, which, at the time, has not a population that fits  
 “ it to become a State, and may govern it as a Territory until  
 “ it has a population which, in the judgment of Congress,  
 “ entitles it to be admitted as a State of the Union. During  
 “ the time it remains a Territory, Congress may legislate  
 “ over it within the scope of its constitutional powers in  
 “ relation to citizens of the United States, and may establish

(l) *Story*, p. xxix.—See opinions of the Attorney-General of the United States (published at Washington, 1841), vol. i. p. 311, as to the conditions under which the State of Illinois entered the Union.

“ Résolution du Congrès des Etats-Unis pour l'admission du Texas au nombre des Etats de l'Union du 22 decembre, 1845.”—*Vide De M. et de C.* 599.

(m) *Story*, b. iii. c. xxx.

*The Neutrality of Great Britain during the American Civil War.*  
 —*M. Bernard*, 1870.

“a Territorial Government; and the form of this local Government must be regulated by the discretion of Congress, but with powers not exceeding those which Congress itself, by the Constitution, is authorized to exercise over citizens of the United States, in respect to their rights of person or rights of property. The territory thus acquired is acquired by the people of the United States for their common and equal benefit; and every citizen has a right to take with him into the territory any article of property, including his slaves, which the Constitution recognizes as property, and pledges the Federal Government for its protection” (n).

This last proposition has been much controverted; though happily, since the abolition of slavery, that controversy has ceased to be important.

“2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State” (o).

#### Sect. 4.

“1. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence” (p).

### ART. VI.

“2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything

(n) *Dred Scott v. Sandford*, 19 *Howard's Rep.* 395.

(o) *Story*, p. xxix.

(p) *Story*, p. xxix.

“in the constitution or laws of any State to the contrary  
“notwithstanding” (q).

### ART. XI.—AMENDMENTS.

“The judicial power of the United States shall not be  
“construed to extend to any suit in law or equity com-  
“menced or prosecuted against one of the United States by  
“citizens of another State, or by citizens or subjects of any  
“Foreign State” (r).

CXX. It is clear from this account of the Constitution of the United States of North America that the whole Federal Body is responsible for the International acts, so to speak, of each State, and of the individuals composing them. For example, if the government of either of the Carolinas inflict an injury upon a foreign nation, that nation must direct its complaints to, and seek its redress from, the Federal Government.

The proposition that each State of the Union is separately responsible for its own misconduct, but that the attempt by a Foreign State to enforce its claims for redress against an individual State would be resisted by the whole Federal Body, is a proposition wholly untenable in reason or law. Joint responsibility must accompany joint protection; therefore the strengthening of the hands of the American Executive has been desired by her ablest statesmen and jurists, as well as by Foreign Powers, in order that she may be the more readily able to fulfil her International obligations (s).

(q) *Story*, p. xxx.

(r) *Ib.* p. xxxiii.

(s) *Wheaton, Elém.*, vol. i. p. 74: “Puisque les relations de ces Etats avec des Etats étrangers, en paix et en guerre, sont maintenues par le gouvernement fédéral, tandis qu’il est expressément défendu aux Etats isolés de l’Union d’exercer ces actes de souveraineté extérieure, il est évident que la souveraineté extérieure de la nation réside exclusivement dans le gouvernement fédéral. L’indépendance de chaque Etat se trouve donc sous ce rapport confondue dans la souveraineté du gouvernement fédéral, et l’on peut par suite qualifier l’Union américaine de *Bundesstaat*.”

This desired result seems to have been in some degree attained during the interval between the first and the present edition of these Commentaries.

The recent civil war between the Southern and Northern States, and the conquest of the latter after a fierce and desperate contest, has not so affected the permanent International relations of the Confederation with Foreign States as to require any special notice in this place. Whether a correct view of the constitution and of the facts of the case was, or was not, taken by the Southern States, who maintained that they formed part of the Union upon conditions expressed in the terms of the Great Charter of the Constitution, and that the violation of them justified their secession; or by the Northern States, who maintained that this secession was unjustifiable in fact and an act of treason in law—whether the employment of armies by the Northern States to coerce the Southern States, and compel them to remain in an Union which they desired to leave, was, or was not, in accordance with the principle of freedom upon which the United States justified their secession from Great Britain (*t*), are not subjects to be discussed even indirectly in this chapter.

*Opinions of the Attorney-General of the United States*, vol. i. *Letter of the Attorney-General*, dated November 20, 1821, p. 392. "The people of the United States seem to have contemplated the National Government as the sole and exclusive organ of intercourse with foreign nations. It ought, therefore, to be armed with power to satisfy all fair and proper demands which foreign nations may make on our justice and courtesy; or, in other words, with power to reciprocate with foreign nations the fulfilment of all the moral obligations, perfect and imperfect, which the Law of Nations devolves upon us as a nation. In this respect, our system appears to be crippled and imperfect."

See the correspondence relating to the project of annexing Cuba to the United States, laid before Parliament April 11, 1853, and especially the English Foreign Secretary's (*Lord John Russell's*) letter of February 16, 1853.

(*t*) President Buchanan, in the annual address of 1860, expressed his clear and strong opinion in the negative.—*Ann. Reg.* 1860, pp. 283-4. But see President Johnson's address, 1866, *Ann. Reg.* p. 293.

Many interesting and important questions of International Law were indeed discussed during the progress of the civil war, which must be considered under their proper heads in other parts of this work.

CXXI. The Central and South American Republics, since the establishment of their independences, have undergone, and will probably yet undergo, frequent divisions and subdivisions. The existing *Federal* Republics are those of Mexico (*u*), the United States of Rio de la Plata, or the Argentine Republic, and the United States of Colombia. In these Federal Republics there is a general Congress, which superintends the relations of the Republics with Foreign States (*x*).

The whole of America is under the government of Christians, being either Europeans or of European descent; this vast continent therefore must be presumed to recognize, not only the obligations of general International Law, but the positive maxims of the European code. This continent is at present parcelled out into the following States.

There are seven Republics in North and Central America, viz :—

United States.	} Central America.	{ 27 States, a Federal District of Mexico, and 1 Territory.
Mexico, Confederate Republic of		
Guatemala.		
Honduras.		
San Salvador.		
Costa Rica.		
Nicaragua.		

The Republics of South America are nine in number, as follows :—

(*u*) I have not thought it necessary to notice the short-lived and unfortunate Empire of Mexico.

(*x*) *Elliot's American Diplomatic Codes*, vol. ii. part iii. Treaties with the new nations of South America.

*Hertslet's* commercial treaties contain nearly all the various conventions between Great Britain and the Central and South American States.

A treaty with the State *Equator*, signed at *Quito*, May 3, 1851, was laid before Parliament in that year.

*Annuaire des Deux Mondes*, 1850, pp. 885, 1104.

Argentine Confederation	{ or, United States of Rio de la Plata, 14 in number: capital, Buenos Ayres.
Peru.	
United States of Colombia	{ formerly New Granada, consisting of 9 States and 6 Territories: capital, Bogota.
Bolivia.	
Chili.	
Venezuela.	
Ecuador.	
Paraguay.	
Uruguay; or, Banda Oriental:	capital, Monte Video.

There is one American monarchy of great territorial extent—Brazil; and there are two republics which divide the island of San Domingo (*y*), viz. San Domingo and Hayti.

The British American provinces are:—

Quebec.	} Forming the Dominion of Canada.
Ontario.	
New Brunswick.	
Nova Scotia, with Cape Breton.	
Prince Edward's Island.	
British Columbia, with Vancouver's Island.	
Manitoba.	
North-west Territories.	
Newfoundland.	
Honduras.	
British Guiana ( <i>z</i> ).	

In 1864 certain resolutions were adopted at a Conference of Delegates from the British North American Colonies as the basis of a proposed Confederation (*a*); and in 1867 the Earl of Carnarvon introduced into Parliament the North American Provinces Confederation Bill. The Bill provided that there should be a Governor-General, appointed by the

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(*y*) The republic of Hayti is in the French, the republic of San Domingo in the Spanish part of the island. As to the claim of Spain to San Domingo, and the nominal cession, in 1861, to her of it by the Republican Presidents and the protest of Peru, see pp. 148–160, t. iv. 2<sup>e</sup> partie, *Rec. gén. cont. of Martens*, by *Samwer*.

(*z*) The French and the Dutch have also colonies in Guiana.

(*a*) *Ann. Reg.* 1864, p. 203.



Crown, receiving a salary from the Colonial funds. The Lieutenant-Governors of the respective provinces were to be appointed by the Governor-General, to hold office for five years. There was to be a general or central Parliament for the united Confederation, and local Legislatures for each province; the central Parliament to consist of an Upper Chamber and Lower House; the seventy-two members of the first to be elected for life, with power to the Crown to nominate not more than six members in certain cases; the Lower Chamber to consist of 181 members, to be elected for five years. The provincial Legislatures would be left to deal with all purely local matters, while all questions common to all the Confederated Provinces would be disposed of by the central Parliament. The Delegates themselves suggested Canada as the name for the new Confederation, and the Queen gave her assent to that designation being adopted by it. The plan did not include Prince Edward's Island, British Columbia, Newfoundland, or Vancouver's Island; but it was to be hoped that in time those colonies would join the Confederation (*b*).

The Act of the Imperial Parliament containing these provisions for the Union of the provinces of Canada, Nova Scotia, and New Brunswick passed soon afterwards, and it enacted that the Queen in Council might declare, by Proclamation, within six months from the passing of the Act, that those provinces should form one Dominion under the name of Canada, and that "such persons shall be first summoned to the Senate as the Queen by warrant, under her Majesty's royal sign manual, thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union."

(*b*) *Ann. Reg.* 1867, pp. 11, 281. In 1870 the province of Manitoba was formed, and admitted into the Union, together with the residue of the Hudson's Bay territory, now called the "North-west Territories." British Columbia, with which Vancouver's Island had been incorporated, joined in 1871, and Prince Edward's Island in 1873. Newfoundland alone remains outside.

A Royal Proclamation was accordingly issued on the 21st of May, in which the persons were named who were to be first summoned to the Senate of Canada. The total number of these was seventy-two, thus distributed: twenty-four for the province of Ontario, twenty-four for the province of Quebec, twelve for the province of Nova Scotia, and twelve for the province of New Brunswick. The new Canadian Parliament was opened at Ottawa, the capital of the Confederation, by the Governor-General, Lord Monck, on the 7th of November, 1867 (c).

CXXII. It is clear that no private associations (d) or companies can be now considered as substantive members of the community of States. The ancient confederation of the Hanse Towns is scarcely to be classed under the category of these private companies, which had at one time, as a distinct Federal Body, a *persona standi* in International Law. No analogy, however, can be derived even from them, applicable to modern companies, associated for the purpose of trade.

The British East India Company, which has now ceased to exist, has indeed exercised sovereign rights in respect to foreign nations, has made war and concluded treaties *in its own name* with Indian princes; but this power was *delegated* to it by the Crown and Parliament of England, and therefore the responsibility for the International acts of the Company rested upon Great Britain, as much as the acts of any other of her accredited public agents; and this Company had no International *status* as a substantive community (e). States associated, for the purposes of trade, into a commercial league (f) may have a sort of International, or rather

(c) *Ann. Reg.* 1867, p. 281.

(d) *Heffters*, ss. 13-29. *Wheaton's Elém.* l. ii. c. i. s. 5, p. ix. *Martens*, l. viii. c. ii. ss. 260-264. *Vattel*, l. iii. c. i. s. 4. *De M. et de C.* l. i. Index: *Compagnie Anglaise des Indes*.

(e) See the case of the *Nabob of the Carnatic v. East India Company*, 1 *Vesey, Jr.* p. 371, and 2 *Ib.* pp. 56-60, as to the former anomalous International as well as National condition of the East India Company.

(f) *Klüber*, ss. 150-153. *Heffters*, ss. 8, 93.

Public Law regulating the intercourse between the members of the league (*g*), upon the principle of the ancient adage, "*Ubi societas ibi jus est*;" but States which are not members of this league are not bound to regard those, who are such, as being clothed, on that account, with any peculiar privileges in their *general* International relations.

CXXIII. This observation is applicable to all associations of States which are not founded upon universal principles of International Law, but framed for the advancement of some particular object: such, for instance, as associations for the suppression of the slave trade, or the great German commercial confederation called the *Zollverein* (*h*).

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(*g*) For example: 1. Equality of rights and obligations among the members. 2. Apportionment of the common burdens according to the means and strength of each individual member. 3. That the original conditions of the association cannot be altered without the consent of every member, &c.—*Vide Hefflers, Ib.*

(*h*) 1 *De M. et de C.* Index to this title, and in *Martens, Nouv. Rec.* xlv. *Lawrence's Wheaton* (French ed.) i. 369-376.

## CHAPTER VI.

## EXTINCTION OF A STATE.

CXXIV. A STATE, like an individual, may die; its corporate capacity may be extinguished, its body politic may perish, though the individual members of it may survive.

CXXV. It ceases to exist when the physical destruction of all its members takes place, or when they all migrate into another territory—events scarcely to be contemplated as possible in the present times—or when the social bond is loosed, which may happen either by the voluntary or compulsory incorporation of the nation into another sovereignty, or by its submission, and the donation of itself, as it were, to another country. On the happening of any of these contingencies (*a*), a State becomes, instead of a distinct and substantive body, the subordinate portion of another society. The incorporation of Wales and Scotland into, and of Ireland with, Great Britain; of Normandy, Brittany, and other provinces into France, are among the most familiar historical instances which illustrate this proposition. To these may now be added the Kingdom of Italy, composed of States which have sought to be incorporated in her; and Prussia, which has by force of arms possessed herself of her weaker neighbours' territories.

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(*a*) *Vattel*, l. i. c. xvi. 194. *Heffters*, b. i. s. 24. *Klüber*, pt. i. c. i. s. 23. *Rutherford*, b. ii. c. x. ss. 12, 13. *Wheaton's Elém.* i. 33.

## CHAPTER VII.

## CHANGES IN A STATE.

CXXVI. BUT a State may undergo most important and extensive changes without losing its personality (a). It may be stripped of a portion of its subjects and its territory; it may place itself under the protection of another State, and be reduced to a semi-sovereignty; thereby, indeed, as has been shown, materially affecting its external relations, though retaining, in many respects, its corporate character: it may change its form of civil constitution or government from a Republic to a limited Monarchy, from an Aristocracy to a Despotism, or to any imaginable shape; but it does not thereby lose its personality, and does not therefore forfeit its rights, or become discharged from its obligations. The nation

(a) *Grotius*, lib. ii. c. ix. iii. i. "Idem si populus. Dixit Isocrates, et post eum Julianus imperator, civitates esse immortales, id est, esse posse, quia scilicet populus est ex eo corporum genere, quod ex distantibus constat, unque nomini subjectum est, quod habet *ἕξιν μίαν*, ut Plutarchus; spiritum unum, ut Paulus Jurisconsultus loquitur. Is autem spiritus, sive *ἕξις*, in populo est vitæ civilis consociatio plena atque perfecta, cujus prima productio est summum imperium, vinculum, per quod respublica cohæret, spiritus vitalis quem tot millia trahunt, ut Seneca loquitur. Plane autem corpora hæc artificialia instar habent corporis naturalis. Corpus naturale idem esse non desinit, particulis paulatim commutatis, una manente specie, ut Alphenus ex philosophis disserit." This opinion of Alfenus is to be found in the *Digest*, l. v. t. i. 76: "De judiciis et ubi quisque agere vel convenire potest." A tribunal had been composed originally of certain judges; some of them during the hearing of the causes had retired, and others been substituted in their place: "Quærebatur, singulorum judicum mutatio *eandem* rem an *aliud* judicium fecisse. Respondi, non modo si unus aut alter, sed et si omnes iudices mutati essent, tamen et rem eandem et judicium idem, quod antea fuisset, permanere."

now governed by a Despot must pay the debt which she incurred under a Republican Government; the treaty contracted by a nation when represented to the rest of the world by the executive of a limited Monarchy, is equally binding upon her when she has fallen under the rule of an Oligarchy.

CXXVII. This vital principle of International Law is a necessary and principal consequence flowing from the doctrine of the moral personality and actual intercommunion of States. The Legion, the Roman jurist said, is the same though the members of it are changed; the Ship is the same though the planks of it are renewed; the Individual is the same though the particles of his body may not be the same in his youth as in his old age, and so “*populum eundem hoc tempore putari qui abhinc centum annis fuisset.*”

CXXVIII. The learned and wise Savigny, discussing the proper manner of cultivating and improving the municipal law of a country, expresses an opinion pregnant with true philosophy, when he observes that there is no such thing as the entirely individual and severed existence of mankind; but that, as every individual man must be considered as the member of a family, a people, and a State, so every age of a people must be regarded as the continuance and development of times that are past (*b*). Every age does not produce its own world according to its own arbitrary will and for itself only, but it does this in indissoluble intercommunion with the whole past (*c*). Every age, therefore, must acknowledge,

(*b*) Shakspeare puts this reasoning into the mouth of the Duke of York:—

“Take Hereford’s rights away, and take from Time  
His charters and his customary rights;  
Let not to-morrow then ensue to-day;  
Be not thyself; for how art thou a king  
But by fair sequence and succession?”

*Rich. II. act ii. sc. 1.*

(*c*) “Our political system is placed in a just correspondence and symmetry with the order of the world and with the mode of existence decreed to a *permanent* body composed of *transitory* parts; wherein by the disposition of a Stupendous Wisdom, so moulding together the great mysterious incorporation of the human race, the whole at one time is

as it were, certain *data*, the inheritance of necessity, and yet not imposed upon it by force: a necessary inheritance, in so far as they are not dependent upon the arbitrary will of the particular present; not imposed upon it by force, because they are not, like the command of a master to a slave, dependent upon the arbitrary will of any particular foreign influence; but, on the contrary, are the free produce of the higher part of the nature of a people, parts of one whole continually existing and continually developing itself. Of this higher part of a people the present age is a member, which wills and acts in and with that whole; so that what is transmitted to us from that whole may be said to be freely produced by this particular member of it. History, Savigny concludes, is not therefore a mere collection of examples, but the only way to the true knowledge of our own actual *status* (*d*). Hooker had long before arrived at Savigny's conclusion: "To be commanded," he says, "we do consent when that Society whereof we are part hath at any time before consented, without revoking the same after by the like universal agreement: wherefore as any man's deed past is good as long as himself continueth; so the act of a public society of men done five hundred years sithence, standeth as theirs who presently are of the same societies, because corporations are immortal: we were then alive in our predecessors, and they in their successors do live still" (*e*).

Applying this principle to International relations, we learn that as one generation does not constitute a State (*f*), it

never old, or middle-aged, or young, but in a condition of unchangeable constancy moves on through the varied tenour of perpetual decay, fall, renovation, and progression."—*Burke*, vol. v. p. 79. *Thoughts on French Revolution*, *Ib.* 183, 184.

(*d*) "Ueber den Zweck der Zeitschrift für die geschichtliche Rechtswissenschaft."—*Savigny*, *Vermischte Schriften*, 1–110.

(*e*) *Hooker*, *Eccles. Pol.* b. i.

(*f*) "Because a nation is not an idea only of local extent and individual momentary aggregation, but it is an idea of continuity which extends in time as well as in members and in space."—*Burke's Works*, vol. x. p. 97: *Reform of Representation in the House of Commons*.

is not merely by the obligations contracted by one generation that the *present* State is bound; the engagements of the *past*, whether arising from the implied contract of long usage, or the express letter of treaty, or the pledge of the Executive Government, howsoever plighted, are as stringent upon her as those of the present. The individual succeeds to rights and obligations which he had no share in obtaining or contracting; and still more is this condition predicable of every corporate body. Nor is the greatest of all corporations, the State, exempt from the operation of a rule which is laid in the eternal constitution of things: “*Cœtus quilibet, non minus quam personæ singulares, jus habet se obligandi per se aut per majorem sui partem. Hoc jus transferre potest tum expresse tum per consequentiam necessariam, puta imperium transferendo*” (*g*). The rule by which an individual’s duties are discovered—namely, by considering the place which he occupies in the great system of the universe—“*qua parte locatus es in re*”—furnishes an equally sound maxim for national as for individual conduct. “*Il ne seroit pas,*” says the Abbé Mably, “*moins superflu de m’arrêter à prouver qu’un Prince est lié par les engagements de son prédécesseur: puisqu’un Prince qui fait un traité n’est que le délégué de sa nation, et que les traités deviennent pour les peuples qui les ont conclus des lois qu’il n’est jamais permis de violer.*” He proceeds to cite a passage from Bodinus to the effect that a King of France is not bound by the treaties of his predecessors; because each King of France is only the “*usufructuarius*” of his kingdom, and does not appoint his successor, who has an absolute right to the throne; and observes truly, “*Il n’est point de lecteur qui ne sente tous les vices de ce misérable raisonnement*” (*h*).

CXXIX. The authority of D’Aguesseau (*i*) and Montes-

(*g*) *Grotius*, l. ii. c. xiv. s. 11, p. 408.

(*h*) *Mably, du Droit public, etc.* t. i. pp. 111, 112.

(*i*) There are some striking remarks of D’Aguesseau, i. 493, s. 4, as to the observance of Treaties.



quieu further strengthens a position of such paramount importance to the peace of the globe. The latter conclusively destroys the sophistry by which it has been sometimes attempted to chicane away the binding force of Treaties, on the ground of their having been extorted by that superior force which might vitiate a civil contract between individuals (*j*).

It might, indeed, have been supposed that this truth was too firmly established, and the value of it too deeply felt and too generally recognized, to be liable to question in these days. After the overthrow of the Orleans dynasty in France, the proclamation of M. de Lamartine (1848) appeared for a moment to throw the weight of France into the opposite scale, as disavowing the obligations of the treaty of Vienna, chiefly, it would seem, because at the time it was made France was governed by a Monarchical, and at the time it was disavowed by a Republican Government (*k*).

Now no doctrine more fatal than this to the tranquillity of the globe can well be maintained—none which it is more the duty of every upholder of International Law to denounce. Nor can any doctrine be more pernicious to the country itself, be it Monarchical or Republican, which propounds it. “Nulla res,” said Cicero, with all the energy of moral wisdom, “vehementius Rempublicam continet quam fides.” What becomes of national faith if it be made to depend upon a form of Government? Much what would become of individual faith if it depended upon no change happening in the condition or age of the individual who plighted it.

CXXX. The importance of the subject did not escape the notice of Grotius; and I do not know that, upon such a point, a higher authority can be appealed to: “Neque refert quomodo gubernetur, regisne, an plurium, “an multitudinis imperio. Idem enim est populus Roma-

(*j*) *Esprit des Lois*, l. xxvi. c. xx.—“Qu’il ne faut pas décider par les principes des lois civiles les choses qui appartiennent au droit des gens.”

(*k*) *Trois Mois au Pouvoir*, par M. de Lamartine, p. 75.

“nus sub regibus, consulibus, imperatoribus. Imo etiamsi  
 “plenissimo jure regnetur, populus idem erit qui antea erat  
 “cum sui esset juris, dum rex ei præsit ut caput istius  
 “populi, non ut caput alterius populi. Nam imperium  
 “quod in rege ut in capite, in populo manet ut in toto, cujus  
 “pars est caput: atque adeo rege, si electus est, aut regis  
 “familia extincta, jus imperandi ad populum redit, ut supra  
 “ostendimus” (l).

And in another part of his great work he expresses his free and manly opinion on this matter: “Huc et illa  
 “frequens quæstio referenda est de pactis personalibus ac  
 “realibus. Et siquidem cum populo libero actum sit,  
 “dubium non est, quin quod ei promittitur sui natura reale  
 “sit, quia subjectum est res permanens. Imo etiamsi status  
 “civitatis in regnum mutetur, manebit fœdus, quia manet  
 “idem corpus etsi mutato capite, et, ut supra diximus, im-  
 “perium, quod per regem exercetur, non desinit imperium  
 “esse populi” (m). With this opinion Heineccius, in his commentary upon Grotius, entirely concurs.

CXXXI. An English civilian of considerable note in his day, commenting upon this passage, recognizes and adopts the doctrine which it conveys: “All leagues and treaties are  
 “national: and where they are not to expire within a shorter  
 “time, though made with usurpers, will bind legal princes if  
 “they succeed, and so *vice versa*; and a league made with a  
 “king of any nation will oblige that nation, if they continue  
 “free, though the Government should be changed to a  
 “Commonwealth, because the nation is still the same  
 “though under different Governments” (n).

Vattel, whom Lord Stowell pronounced to be not the least indulgent of modern professors of Public Law (o), speaks unhesitatingly to the same effect: “Puisque les traités publics,

(l) *Grotius*, l. ii. c. ix. s. 8.

(m) *Ib.* l. ii. c. xvi. s. 16.

(n) *An Essay concerning the Laws of Nations and the Rights of Sovereigns*, by Matthew Tindall, LL.D. p. 14 (London, 1734).

(o) *The Maria*, 1 C. Rob. Adm. Rep. p. 163.

“ même personnels, conclus par un roi, ou par tout autre  
 “ souverain qui en a le pouvoir, sont traités de l’Etat, et  
 “ obligent la nation entière, les traités réels, faits pour sub-  
 “ sister indépendamment de la personne qui les a conclus,  
 “ obligent sans doute les successeurs. L’obligation qu’ils  
 “ imposent à l’Etat passe successivement à tous ses con-  
 “ ducteurs, à mesure qu’ils prennent en main l’autorité  
 “ publique. Il en est de même des droits acquis par ces  
 “ traités. Ils sont acquis à l’Etat, et passent à ses con-  
 “ ducteurs successifs” (p). And in another place he says :  
 “ Dès qu’une puissance légitime contracte au nom de l’Etat,  
 “ elle oblige la nation elle-même, et par conséquent tous les  
 “ conducteurs futurs de la société. Lors donc qu’un prince  
 “ a le pouvoir de contracter au nom de l’Etat, il oblige tous  
 “ ses successeurs : et ceux-ci ne sont pas moins tenus que  
 “ lui-même à remplir ses engagements ” (q).

CXXXII. The language of Bynkershoek is still more forcible. In one passage he observes : “ Recte dixit Grotius  
 “ jus populi non deficere nisi deficiat ipse populus. Forma  
 “ autem regiminis mutata non mutatur ipse populus.  
 “ Eadem utique respublica est, quamvis nunc hoc, nunc alio  
 “ modo regatur ; alioquin diceres, rempublicam in statu,  
 “ quo nunc est, exsolutam videri pactis et debitis in alio  
 “ statu contractis. De debitis id dicere non licere consentit  
 “ Grotius (r). De pactis ut idem dicamus, eadem quæ in  
 “ debitis obtinet ratio persuaserit ” (s). His chapter “ De  
 “ servanda fide pactorum publicorum, et an quæ eorum tacitæ  
 “ exceptiones,” begins : “ Pacta privatorum tuetur jus civile,  
 “ pacta principum bona fides. Hanc si tollas, tollis mutua  
 “ inter principes commercia, quæ oriuntur e pactis expressis,  
 “ quin et tollis ipsum jus gentium, quod oritur e pactis  
 “ tacitis et præsumptis, quæ ratio et usus inducunt ” (t).

(p) *Vattel, Le Droit de Gens*, l. ii. c. xii. s. 191, p. 400.

(q) *Ib.* l. ii. c. xiv. s. 215.

(r) *De Jure Bel.* l. ii. c. ix. s. 8, n. 3.

(s) *Q. J. P.* l. ii. c. xxv. — *Variae Quæstionculæ*.

(t) *Q. J. P.* l. ii. c. x. See, too, *Burke's Tracts on the Popery Laws*, c. iii. in *fine*, as to the ratification of the Treaty of Limerick.

He then proceeds to comment upon the sophistry which defends a departure from the obligations of treaties: "Hæc  
 "pactis omnibus inesse credit clausulam salutarem, *rebus sic*  
 "stantibus, atque adeo a pactis recedi posse: I. Si qua nova  
 "causa, satis idonea, obveniat. II. Si res eo deducta sit, unde  
 "incipere non possit. III. Si ipsa pactorum ratio cesset.  
 "IV. Si necessitas ac utilitas reipublicæ aliud flagitent" (u).

The last pretext he denounces as a detestable Machiavelism—"the beast of many heads, *Reason of State*, the bane  
 "of Princes," and characterizes the three former excuses as  
 "totidem ruptæ fidei velamenta;"—and again, in his boldest  
 manner, "Promissum igitur, si me audias, etiam tunc ser-  
 "vandum, cum id servari Reipublicæ non expediat, imo  
 "periculosum sit" (x).

CXXXIII. Not less emphatic and decisive is the language  
 of the great Republican Confederation of North America :  
 "Nations are at liberty" (says Mr. Chancellor Kent) "to  
 "use their own resources in such manner and to apply them  
 "to such purposes as they may deem best, provided they do  
 "not violate the perfect rights of other nations, nor endanger  
 "their safety, nor infringe the indispensable duties of  
 "humanity. They may contract alliances with particular  
 "nations, and grant or withhold particular privileges, in  
 "their discretion. By positive engagements of this kind a  
 "new class of rights and duties is created, which forms the  
 "conventional law of nations, and constitutes the most  
 "diffusive, and generally the most important branch of  
 "public jurisprudence. And it is well to be understood, at  
 "a period when alterations in the constitutions of Govern-  
 "ments and revolutions in States are familiar, that it is a  
 "clear position of the law of nations that treaties are not  
 "affected, nor positive obligations of any kind with other  
 "Powers or with creditors weakened, by any such mutations.  
 "A State neither loses any of its rights nor is discharged

(u) *Bynkershoek, Q. J. P. l. ii. c. x.*

(x) See, too, *Cicero, De Off. l. iii. c. v. 6, 11.*

“from any of its duties by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication” (y).

CXXXIV. Puffendorf, in his chapter “De mutatione et interitu civitatum,” adds the authority of Sweden to fortify these positions in one of the best chapters of his treatise on “De Jure Naturæ et Gentium” (z).

CXXXV. We have, then, this opinion of the continuity of the rights and obligations of a State confirmed by the unanimous authority of the most celebrated jurists and statesmen (a) of all countries. This accumulation of authorities must not be regarded as an idle parade of evidence, because, as has been already observed, a proposition which

(y) *Kent's Commentaries on American Law*, vol. i. pp. 25, 26.

*Wheaton* (Élém. i. 33) speaks fully to the same effect: “Un Etat est un corps changeant quant aux membres qui composent la société, mais quant à la société même, c'est le même corps dont l'existence est perpétuée par une succession constante de membres nouveaux. Cette existence continue tant qu'aucun changement fondamental n'a été introduit dans l'Etat.”

(z) L. viii. c. xiv.

(a) “L'unité permanente qui s'établit, et le développement progressif qui s'opère par cette tradition incessante des hommes aux hommes, et des générations aux générations, c'est là le genre humain; c'est son originalité et sa grandeur; c'est un des traits qui marquent l'homme pour la souveraineté dans ce monde, et pour l'immortalité au-delà de ce monde.

“C'est de là que dérivent et par là que se fondent la famille et l'Etat, la propriété et l'hérédité, la patrie, l'histoire, la gloire, tous les faits et tous les sentiments qui constituent la vie étendue et perpétuelle de l'humanité au milieu de l'apparition si bornée et de la disparition si rapide des individus humains.

“La République sociale supprime tout cela; elle ne voit dans les hommes que des êtres isolés et éphémères qui ne paraissent dans la vie et sur cette terre, théâtre de la vie, que pour y prendre leur subsistance et leur plaisir, chacun pour son compte seul, au même titre et sans autre fin.

“C'est précisément la condition des animaux. Parmi eux, point de lien, point d'action qui survive aux individus et s'étende à tous; point d'appropriation permanente, point de transmission héréditaire, point d'ensemble ni de progrès dans la vie de l'espèce; rien que des individus qui paraissent et passent, prenant en passant leur part des biens de la

is maintained by the concurrent voice of eminent jurists of various civilized countries becomes *ipso facto*, as it were, a part of International law (*b*).

CXXXVI. We arrive, then, with confidence at the conclusion, that this reciprocal observance of good faith, whether it be plighted to the payment of debts or to the fulfilment of the stipulations of treaties (*c*), is binding upon all nations. This good faith is the great moral ligament which binds together the different nations of the globe (*d*). Without this, war would be, as has been sometimes asserted, the perpetual destiny of mankind, and that miserable fiction of shallow declamation and specious sophistry would be reality and truth.

CXXXVII. It remains only to add a proposition which is indeed a corollary from the foregoing statements. If a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, rateably binding upon the different parts (*e*): "Contra

terre et des plaisirs de la vie, dans la mesure de leur besoin et de leur force qui font leur droit."—*De la Démocratie en France*, par M. Guizot, pp. 58–60.

(*b*) *Vide ante*, ch. vii. p. 62.

(*c*) "Item foedera pacis et induciarum possunt sub hoc capite collocari, non quatenus servanda sunt postquam sunt facta; hoc enim potius pertinet ad jus naturale."—*Suarez de Legibus et Deo Legislatore*, p. 100.

(*d*) "Je ne crois pas" (says Abbé Mably) "qu'il soit nécessaire de parler dans cet ouvrage de la fidélité scrupuleuse avec laquelle les Etats doivent remplir leurs engagements; je ne fais pas ici un traité de droit naturel. D'ailleurs que pourrais-je ajouter à ce que tant de savans hommes ont écrit sur cette matière? Exécuter ces promesses, c'est le bien de la société générale, c'est la base de tout le bonheur de chaque société particulière; tout nous le prouve, tout nous le démontre, cette vérité dont de mauvais raisonneurs veulent douter est connue des peuples, le moins policés; et les princes malheureux, qui se font un jeu de leurs sermens, feignent de la respecter, si leur ambition n'est pas stupide ou brutale."—Tome i. p. 111.

(*e*) "Dass übrigen die Acten der Staatsgewalt eines frühern Herrschers, welche der Verfassung des regierten Staates entsprechen, auch für den Nachfolger verbindlich sind, kann gewiss nach internationalem Recht in

“evenit” (as Grotius expresses himself) “ut quæ una civitas  
 “ fuerat, dividatur, aut consensu mutuo, aut vi bellica, sicut  
 “ corpus imperii Persici divisum est in Alexandri successores.  
 “ Quod cum fit, plura pro uno existunt summa imperia, cum  
 “ suo jure in partes singulas. Si quid autem commune  
 “ fuerit, id aut communiter est administrandum, aut pro  
 “ ratis portionibus dividendum” (*f*). And “so” (says Mr.  
 Chancellor Kent) “if a State should be divided in respect  
 “ to territory, its rights and obligations are not impaired;  
 “ and if they have not been apportioned by special agree-  
 “ ment, those rights are to be enjoyed, and those obligations  
 “ fulfilled, by all the parts in common” (*g*). So Mr. Justice  
 Story, delivering a judgment in the Supreme Court of the  
 United States, observed: “It has been asserted as a principle  
 “ of the common law, that the division of an empire creates  
 “ no forfeiture of previously vested rights of property; and  
 “ this principle is equally consonant with the common sense  
 “ of mankind, and the maxims of eternal justice” (*h*). Lastly,  
 it should be observed, that this principle is *in viridi obser-*  
*vantia* in International practice, and was incorporated into  
 the treaty by which the modern kingdom of Belgium was  
 established (*i*).

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keinen Zweifel gezogen werden.”—*Heffters*, s. 57, p. 111; *Zachariä*,  
 Staats- und Bundesrecht, s. 58.

(*f*) *Grotius*, l. ii. c. ix. s. 10.

(*g*) *Kent's Commentaries*, vol. i. p. 25.

(*h*) *Terrett and Others v. Taylor and Others*, 9 *Cranch (American)*  
*Reports*, 50; citing *Kelly v. Harrison*, 2 *John. c.* 20; *Jackson v. Lunn*,  
 5 *John. c.* 100 (*American*); *Calvin's Case*, 7 *Co.* 27.

(*i*) *Wheaton's Hist.* 546.

# PART THE THIRD.

## CHAPTER I.

### OBJECTS OF INTERNATIONAL LAW.

CXXXVIII. THE Sources and the Subjects of International Law having been stated, it remains to consider the Objects of this system of jurisprudence; that is, the Rights which are to be ascertained, protected, and enforced by this law (*a*).

CXXXIX. These rights flow as moral and logical consequences from the positions laid down in the first chapter with regard to the Individuality and Intercommunion of States, and from the definition of a State in the second chapter. Some of these rights concern more immediately the internal and domestic, others the external and foreign, condition of a State. Moreover, the rights of nations, like the rights of individuals, admit of a general division into rights which relate to persons, to things, and to the mode of their enforcement.

CXL. These are rights properly so called—rights *stricti juris*; but the constant intercourse and increasing civilization of nations has given rise to a usage and practice which greatly mitigates the severity with which these rights,

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(*a*) "Jus gentium est sedium occupatio, ædificatio, munitio, bella, captivitates, servitutes, postliminia, fœdera, paces, induciæ, legatorum non violandorum religio, connubia inter alienigenas prohibita. Hoc inde jus gentium appellatur, quia eo jure omnes fere gentes utuntur."—*Decret. i. Dist. i. c. ix.*



abstractedly considered, might be exercised, both with respect to the foreign community, in its *aggregate* capacity, and with respect to the persons of the *individual* members belonging to it. This usage is called *comitas gentium*—the comity of nations—*droit de convenance*.

CXLI. With regard to the intercourse of *individual* members of different States, this COMITY has been suffered to grow up into what may be termed a *jus gentium privatum*; and which requires, on account of its magnitude and importance, a separate and distinct notice in another part of this work.

CXLII. With regard to a State in its *aggregate* capacity, questions of Comity, being much fewer in kind, and rarer in occurrence, may be conveniently mentioned and distinguished in the general treatment of rights properly so called.

CXLIII. But with regard to both, the fundamental distinction between the *usage* of *comity* and the right *stricti juris* must never be forgotten (*b*).

(*b*) “Non minus sollicitè separavimus ea quæ juris sunt, strictæ ac propriæ dicti, unde restitutionis obligatio oritur, et ea quæ juris esse dicuntur, quia aliter agere cum alio aliquo rectæ rationis dictato pugnat.” —*Grot. Proleg. s. 41*.

In the case of the *Maria*, Lord *Stowell* observes (speaking of Art. 12 of the Order of Council, 1664, which directs, “That when any ship, met withal by the Royal Navy or other ship commissioned, shall fight or make resist, the said ship and goods shall be adjudged lawful prize”): “I am aware that in those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time, for they are expressly censured by Lord *Clarendon*. But the article I refer to is not of those he reprehends; and it is observable that Sir *Robert Wiseman*, then the King’s Advocate-General, who reported upon the Articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that that rule may not have been broken in upon in some instances by *considerations of comity* or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a State may recede from its extreme rights, and that its supreme

The violation of rights *stricti juris* may be redressed by forcible means, by the operation of war, which in the community of nations answers to the act of the Judicial and Executive Power in the community of individuals. But the departure from the usage of Comity cannot be legally redressed by such means. The remedy, where expostulation has failed, must be a corresponding reciprocity of practice on the part of the nations whose subjects are so treated. "Illud quoque sciendum est," observes Grotius; "si quis quid debet, non ex justitia propria, sed ex virtute alia, puta liberalitate, gratia, misericordia, dilectione, id sicut in foro exigi non potest, ita nec armis deposci" (c). It is, however, often a question of some nicety and difficulty to ascertain to which class an asserted claim belongs, because the usage which had its origin in the precarious concession of Comity may be, and in many instances has been, transferred, through uninterrupted exercise and the lapse of time, into the certain domain of Right.

councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the State itself would possess under the same facts of capture."—1 *C. Rob. Adm. Rep.* 367, 368.

And again, further on in the same case, he says: "It is lastly said, that they have proceeded only against the merchant vessels, and not against the frigate, the principal wrong-doer. On what grounds this was done—whether on that sort of *comity* and respect which is not unusually shown to the immediate property of great and august Sovereigns, or how otherwise, I am again not judicially informed; but it can be no legal bar to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party, against whom he had an equal or possibly a superior title."—*Ib.* p. 376.

"*De officiis innoxie utilitatis*, quæ, si primam illorum originem spectaveris, sunt imperfecta, per ea, quæ accedunt, autem in perfecta mutari atque transire possunt; paullo difficilior est disquisitio."—*De Necessitate et Usu Juris Gentium Dissertatio*, c. ii. s. 17.—*Pestel.*

See the part of this work which relates to COMITY for distinction between *Jus Gentium* and *Jus inter Gentes*.

(c) *Grotius*, l. ii. c. xxii. s. 16.

## CHAPTER II.

## RIGHTS OF INDEPENDENCE AND EQUALITY.

CXLIV. SOME of the Rights of nations appear to flow more directly from the first, and some more directly from the second of those propositions which have been laid down as together constituting the basis of International Law (*a*).

CXLV. From the first proposition—namely, that States are recognized as free moral persons—seem to be more especially derived the Rights incident to INDEPENDENCE, which are the following:—

1. The right to a Free Choice, Settlement, and Alteration of the Internal Constitution and Government without the intermeddling of any foreign State.

2. The right to Territorial Inviolability, and the free use and enjoyment of Property.

3. The right of Self-preservation, and this by the defence which *prevents* as well as by that which *repels* attack.

4. The right to a free development of national resources by Commerce.

5. The right of Acquisition, whether original or derivative, both of Territorial Possessions and of Rights.

6. The right to absolute and uncontrolled Jurisdiction over all persons and things *within*, and in certain exceptional cases *without*, the limits of the territory. Under this head may be considered the status of Christians in Mohanmedan or Infidel countries, not being subjects of those countries, and the question of Extradition of criminals.

(*a*) *Vide ante*, ch. iii.

Kaltenborn, Kap. v. s. 9 : "Versuch einer wissenschaftlichen Systematik des Völkerrechts."

**CXLVI.** The limitations which the abstract Rights of one nation may receive in their practical exercise from the existence of similar Rights in another nation, will be considered in a chapter on the doctrine of INTERVENTION.

**CXLVII.** From the second proposition—namely, that each State is a member of an Universal Community—seem to be more especially derived the Rights incident to EQUALITY, which are the following:—

1. The Right of a State to afford protection to her lawful subjects wheresoever commorant; and under this head may be considered the question of debts due from the Government of a State to the subjects of another State.

2. The Right to the Recognition by Foreign States of the National Government.

3. The right to External marks of Honour and Respect.

4. The Right of entering into International Covenants or Treaties with Foreign States.

## CHAPTER III.

## RIGHT TO A FREE CHOICE OF GOVERNMENT.

CXLVIII. I.—WE will now consider the rights which flow as necessary consequences from the INDEPENDENCE of States.

And first in the rank of internal and domestic rights is, the liberty incident to every Independent State, of adopting whatever form of government, whatever political and civil institutions, and whatever rulers she may please, without the interference or control of any foreign Power. This elementary proposition of International Law is so unquestionable that it would be superfluous to cite authorities in support of it (*a*).

CXLIX. This proposition, nevertheless, however true and however important, generally speaking, is not without some limitations in its practical application; because, rights on the part of other States, members of the same system, may control, to a certain extent, the right of unlimited liberty generally incident to a State in the establishment of its

(*a*) It is nowhere more faithfully enunciated than in *Günther*, i. 284, ss. 6, 7: "Keine Nation ist befugt, sich in die Handlungen der andern zu mischen, *am wenigsten* in die innere Staatsverfassung." The principle is recorded in many treaties; *e. g.* Treaty of the *Pyrenees*, 1659 (Art. 60—France promises not to interfere in the affairs of Portugal); Peace of *Lübeck*, 1629 (Arts. 2, 3—the Emperor of Germany takes a similar engagement as to Denmark—a reciprocal one being taken by Denmark); Peace of *Neustadt*, 1721 (Art. 7—Russia makes a like promise with respect to Sweden). Most of the great European Powers have, on various occasions, formally, at least, promulgated the same doctrine. *Vide post*, INTERVENTION—BALANCE OF POWER.

government, as the right of an individual in society to perfect liberty is, to a certain extent, limited by a similar right in his neighbour. The limitation of which this right is susceptible will be discussed hereafter in the chapter on INTERVENTION.

## CHAPTER IV.

## TERRITORIAL INVIOABILITY—NATIONAL POSSESSIONS.

CL. II.—A STATE, like an Individual, is capable of possessing property. The property of a State is marked by the same characteristics relatively to other States, as the property of Individuals relatively to other Individuals; that is to say, it is exclusive of all foreign interference and susceptible of free disposition (a).

This property consists of Things (*corpora*), and of Rights to things (*jura*); or, in other words, it consists of things divided into those which are corporeal or incorporeal, movable or immovable (*res, bona, pecunia*) (b). As in the case of Individuals, certain things belong by their nature so equally to every person, that they are incapable of being appropriated by any one person; so in the case of States, certain things

(a) *Heffters*, s. 64.

(b) "Cum pupillus a tutore stipulatur *rem* salvam fore, non solum quæ in patrimonio habet, sed etiam quæ in nominibus sunt, ea stipulatione videntur contineri."—*Dig.* lib. xlv. t. vi. 9.

"In *bonis* autem nostris computari sciendum est non solum quæ domini nostri sunt, et si bona fide a nobis possideantur vel superficiaria sint. Æque bonis adnumerabitur, etiam si quid est in actionibus, petitionibus, persecutionibus: nam hæc omnia in *bonis* esse videntur."—*Ib.* lib. l. t. xvi. 49.

"*Pecunia* verbum non solum numeratam pecuniam complectitur: verum omnem omnino pecuniam, hoc est omnia *corpora*: nam corpora quoque pecuniæ appellatione contineri nemo est qui ambiget."—*Ib.* 178.

"*Pecunia* nomine non solum numerata pecunia; sed omnes res, tam soli quam mobiles, et tam corpora quam jura continentur."—*Ib.* 222.

belong so equally to all communities, as to be incapable of being appropriated by any one of them (*extra commercium—extra patrimonium*).

All these Things and Rights taken together would be designated by the Roman law "*universitas*" (c). At present we are concerned only with that portion of this collective whole which relates to real or territorial rights, and more especially with the right which flows from the above-mentioned characteristic of exclusiveness—namely, the Right of Territorial Inviolability.

CLI. A State in the lawful possession of a territory has an exclusive right of property therein, and no stranger can be entitled, without her permission, to enter within her boundaries, much less to interfere with her full exercise of all the rights incident to that supreme dominion, which has obtained from jurists the appellation of *dominium eminens*.

CLII. No individual proprietor can alienate his possessions from the State to which they belong, and confer the property of, or the sovereignty over, them to another country (d). Whether and to what extent it may be competent to the sovereign of a territory to alienate any portion of it will be hereafter considered.

CLIII. This general principle of *dominium eminens* is applicable to all possessions, whether acquired, 1, by recent acquisition, through the medium of discovery and lawful occupation; 2, by lawful cession or alienation; 3, by conquest in time of war, duly ratified by treaty; or, 4, by prescription.

CLIV. National Territory consists of water as well as land; and, in order to examine carefully the former species of possession, we must consider whether, and to what extent,

(c) "*Bonorum appellatio, sicut hæreditatis, universitatem quandam ac jus successionis, et non singulas res demonstrat.*"—*Dig. lib. l. t. xvi.* 208.

(d) *De Gardien, Traité de Diplomatie*, t. i. p. 387.



and under what limitations, the following waters may be the objects of national property and dominion :—

1. Rivers and Lakes.
2. The Open Sea.
3. The Narrow Seas.
4. The British Seas.
5. The Straits.
6. Portions of the Sea.

## CHAPTER V.

## PROPERTY OF A STATE—RIVERS.

CLV. No difficulty can arise with respect to Rivers and Lakes entirely enclosed within the limits of a State; but questions of some difficulty have arisen with respect to rivers which are not so enclosed, but which flow through more than one State (*a*). The Roman law declared all navigable rivers to be so far public property that a free passage over them was open to everybody, and the use of their banks (*jus littoris*) for anchoring vessels, lading and unlading cargo, and acts of the like kind, to be incapable of restriction by any right of private domain (*b*).

CLVI. The navigable rivers, however, were classed, according to that law, among the "*res publicæ*," and not, as might appear from a superficial view, among the "*res communes*," as the sea was. Rivers were the *public* property of the State, not *common* to the whole world, like the ocean (*c*).

CLVII. It has been contended, that the principle of this law has been engrafted upon International Law, and that it is a maxim of that law that the ocean is free to all mankind, and rivers to all *riparian* inhabitants. So that the nation which possessed both banks of a river where it disembogued itself into the sea, was not at liberty to refuse the nation or nations which possessed the banks of the river

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(*a*) *Grotius*, l. ii. c. ii. ss. 12-14, p. 191; c. iii. ss. 7-12, p. 207.

(*b*) *Inst.* l. ii. tit. i. ss. 1-5; *Dig.* l. i. tit. viii. s. 5.

(*c*) "*Quædam enim naturali jure communia sunt omnium, quædam publica. . . . Et quidem naturali jure communia sunt omnia hæc: Aër, Aqua profluens, et Mare, et per hoc littora maris. . . . Flumina autem omnia, et Portus, publica sunt.*"—*Inst.* l. ii. tit. i. ss. 1, 2.

higher up, from the use of the water, for the passage of vessels to the sea, and from the incidental use of the banks for the purposes mentioned above (*d*). The opinion of Grotius (*e*) seems to be in favour of this position; for he held that, though the property and domain over the stream belonged to the riparian States, “at idem flumen qua aqua “profluens vocatur, commune mansit” (*f*); and this upon two grounds: 1. Because this was one of the rights excepted and reserved, at the period when the right of property was introduced as a limitation upon the original community of possession, in which fiction this great man believed; but as the basis of this opinion clearly was and is now universally acknowledged to be a fiction, this reason, built upon the supposition of its being a truth, can be of no avail (*g*). 2. Because the use of rivers belonged to the class of things “*utilitatis innoxie*” (*h*), the value of the stream being in no way whatever diminished to the proprietors by this *innocent use* of them by others, inasmuch as the use of them is inexhaustible (*i*). Grotius, as it will be necessary to remark hereafter, appears to have considered the right of mere passage (*jus transitus innoxii*) by one nation over the domain of another—whether that domain was an arm of the sea, or lake, or river, or even the land—to be one of *strict law*, and not of *comity*; but his opinion is not founded upon any sound or satisfactory reason, and is at variance with that of almost all other jurists (*j*). For, the reason of the thing and the opinion of other jurists, speaking generally, seem to

(*d*) *Wheaton's History of the Law of Nations*, p. 502.

(*e*) *Lib. ii. c. ii. s. 12 et seq.* p. 191.

(*f*) *Vattel*, l. i. c. x. ss. 103, 104; l. i. c. xxiii. s. 292.

(*g*) So *Vattel*, t. i. l. ii. c. ix. s. 123: “—un reste de la communion primitive.”

(*h*) *Grotius*, l. ii. c. ii. s. 11.

(*i*) *Vattel*, t. i. l. ii. c. ix. s. 126: “Des choses d'un usage inépuisable.”

(*j*) *Monsieur Eugène Ortolan*, however, a modern French author, who writes with care, good sense, and perspicuity, agrees with *Grotius*. See *Des Moyens d'acquérir le Domaine international ou Propriété d'Etat entre les Nations*, etc. p. 30 (Paris, 1851).

agree in holding that the *right* can only be what is called (however improperly) by *Vattel* and other writers *imperfect*, and that the State, through whose domain the passage is to be made, must be the sole judge as to whether it be innocent or injurious in its character (*k*).

CLVIII. It may be conceded, however, that the right to the free navigation of a river being once granted, the innocent use of the *different waters* which unite that river with the sea follows as a matter of course, and by necessary implication. This proposition was stoutly maintained by the States who were interested in the free navigation of the Rhine, and who insisted that no other construction could be put upon the expressions in the Treaties of Paris and Vienna, declaring that river to be free. “Du point où il devient “navigable jusqu’à la mer” (*l*), which expressions included, not only the course of the Rhine Proper, which lost itself in the sands, but the other channels through which this river disembogued itself into the sea (*m*).

CLIX. And it may also be admitted, that when this right of free navigation has been conceded, the maxim of Roman jurisprudence applies, and that the right of the shores is incident to the use of the water. Mr. Wheaton remarks, in his valuable “History of the Law of Nations,” that the laws of every country probably intended the same provision; and he adds a remarkable instance of the practical application of the principle in the following precedent of International Law:—“This” (he says) “must have been so understood “between France and Great Britain at the Treaty of Paris, “when a right was ceded to British subjects to navigate the “whole river (the Mississippi), and expressly that part “between the island of New Orleans and the western bank,

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(*k*) *Puffendorf*, l. iii. c. iii. s. 8. *Wheaton's Elem. of International Law*, vol. i. pp. 229, 230. *History of the Law of Nations*, pp. 508–510. *Puffendorf*, l. iii. c. iii. ss. 3–6. *Wolff's Inst.* ss. 310–312. *Vattel*, l. i. s. 292; l. ii. ss. 123–130.

(*l*) *De Martens et de Cussy, Rec. de Tr.* t. iii. p. 179.

(*m*) *Annual Register* for 1826, pp. 259–263.

“ without stipulating a word about the use of the shores,  
 “ though both of them belonged then to France, and were  
 “ to belong immediately to Spain. Had not the use of the  
 “ shores been considered as incident to that of the water, it  
 “ would have been expressly stipulated, since its necessity  
 “ was too obvious to have escaped either party. Accord-  
 “ ingly, all British subjects used the shores habitually for  
 “ the purposes necessary to the navigation of the river; and  
 “ when a Spanish governor undertook at one time to forbid  
 “ this, and even cut loose the vessels fastened to the shores,  
 “ a British vessel went immediately, moored itself opposite  
 “ the town of New Orleans, and set out guards with orders  
 “ to fire on such as might disturb her moorings. The  
 “ governor acquiesced, the right was constantly exercised  
 “ afterwards, and no interruption was offered ” (n).

CLX. These accessories, however, can of course only be demanded when the principal right has been granted; and we must return to the position, that where the free navigation of a river has not been conceded by the State possessing both banks, there is no sufficient authority for maintaining that such concession can be, irrespectively of treaty, lawfully compelled. It is true, indeed, that the United States of America, in their controversy with Spain with reference to the navigation of the Mississippi, before the Treaty of Lorenzo el Real in 1795, insisted upon a strict International right, founded, as it was alleged, upon the natural sentiments of man, to the free use of rivers from the source to the mouth by *all* riparian inhabitants. But the practice of nations was not at that time in favour of this position, and a treaty was finally resorted to in this, as it has been since in other cases, as the only certain means of placing this claim upon the footing of right, and of securely regulating its exercise.

CLXI. The general law on this head is summed up with characteristic perspicuity by Lord Stowell in the case of the

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(n) *Hist. of the Law of Nations*, 510, 511.

*Twee Gebræders* (o). This was a case of considerable importance, as it respected the claim of a sovereign State to a right of territory over the spot where the capture in question was alleged to have taken place. The case arose on the capture of vessels in the *Groningen Watt*, on a suggestion that they were bound from Hamburg to Amsterdam, then under blockade, and a claim was given under the authority of the Prussian minister, averring the place in question to be within the territories of the King of Prussia. Lord Stowell said, "It is scarcely necessary to observe, that "a claim of territory is of a most sacred nature. Strictly "speaking, the nature of the claim brought forward on this "occasion is against the general inclination of the law, for "it is a claim of private and exclusive property, on a subject "where a general, or at least a common use is to be presumed. "It is a claim which can only arise on portions of the sea, "or on rivers flowing through different States: the law of "rivers flowing entirely through the provinces of one State "is perfectly clear. In the sea, out of the reach of cannon-shot, universal use is presumed; in rivers flowing through "conterminous States, a common use of the different States "is presumed. Yet, in both of these, there may, by legal "possibility, exist a peculiar property excluding the universal "or the common use. Portions of the sea are prescribed "for, so are rivers flowing through contiguous States; the "banks on one side may have been first settled, by which "the possession and property may have been acquired, or "cessions may have taken place upon conquests, or other "events. But the general presumption certainly bears "strongly against such exclusive rights, and the title is a "matter to be established, on the part of those claiming "under it, in the same manner as all other legal demands "are to be substantiated, by clear and competent evidence. "The usual manner of establishing such a claim is, either "by the express recorded acknowledgment of the conter-

“minous States, or by an ancient exercise of executive  
 “jurisdiction, founded presumptively on an admission of  
 “prior settlement, or of subsequent cession. One hardly  
 “sees a third species of evidence, unless it be, what this  
 “case professes to exhibit, the decision of some common  
 “superior in the case of a contested river. The sea admits  
 “of no common sovereign; but it may happen that con-  
 “minous States, through which a river flows, may acknow-  
 “ledge a common paramount sovereign, who, in virtue of  
 “his political relation to them, may be qualified to appro-  
 “priate exclusively and authoritatively the rights of territory  
 “over such a river, to one or other of them.”

CLXII. This *free navigation*, and this *innocent use* of rivers, have formed an important part of many treaties; and the subject has been most carefully considered in some of the principal conventions of modern times.

CLXIII. When the Seven United Provinces had obtained, after a struggle of eighty years' duration, the recognition of their independence from the crown of Spain, they were not contented with having achieved their own liberty, and with having possessed themselves of some of the richest colonies of their former sovereign in the New World: they strove, being far-sighted according to the notions of trade then prevalent, to secure to themselves, both at home and abroad, the closest commercial monopoly (*p*); and by the peace of Münster (Jan. 30, 1648) they actually compelled Philip the Fourth to deprive the Ten Provinces, which had retained their allegiance, of the commercial advantages naturally incident to their geographical situation. The fourteenth article of that Peace (*q*) contained a stipulation that the Scheldt in all its branches,

(*p*) Koch, *Histoire des Traités de Paix*, tom. i. pp. 84, 483 (ed. Bruxelles, 1837).

(*q*) The stipulation was said to be only a confirmation of the ancient right of Staple (*d'étapes*) by which foreign vessels entering the Scheldt were compelled to break bulk, and put their cargo on board Dutch vessels; but by this stipulation foreign vessels were absolutely prohibited from entering the Scheldt.

and in its mouths of Sas, Zwyn (*r*), and the other openings into the sea, should be for ever closed to the Belgian provinces. This stipulation, to which the ruin of the once magnificent commerce of Antwerp has been ascribed, was rigidly enforced till 1783 (*s*), when Joseph the Second endeavoured to remove the unnatural obstacles to the natural prosperity of his fine Belgic provinces, by forcing, most illegally it must be confessed, the opening of the Scheldt. But the Dutch made on the whole a successful resistance to this attempt, retaining, by the Treaty of Fontainebleau (which they concluded, under the mediation of France, with Joseph in 1785), the Scheldt from Saftingen to the sea, and all the mouths of the Scheldt in the same closed condition, in which they had been placed by the Treaty of Münster. The forcible opening of this navigation by the French when they overran Belgium in 1792, and the utter disregard which they avowed for all treaties upon the matter, was one of the circumstances which brought England and Holland into the war against France.

CLXIV. The Treaty of Vienna in 1815 introduced a more liberal principle upon this subject into the public law of Europe. The final act of the Congress of Vienna provided, by what is called the *Annexe* XVI., that the navigation of all rivers separating or traversing different States should be entirely free, from the point where each river became navigable to the point of its disemboguing into the sea (*t*). The

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(*r*) The Dutch, it should be observed, always maintained that the whole course of the two branches of the Scheldt, which passed within the dominions of Holland, was entirely *artificial*; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great labour and expense.

(*s*) See *Martens' Causes célèbres*, t. ii. p. 203—Cause huitième: "Différends survenus, en 1783 et 1784, entre l'Autriche et la République des Provinces unies des Pays-Bas, au sujet des limites de la Flandre, de la cession de Maestricht, de l'ouverture de l'Escaut, et du commerce aux Indes Orientales."

(*t*) *Hertael's Tr.* vol. i. p. 2.—"Art. CVIII. Les puissances dont les états sont séparés ou traversés par une même rivière navigable, s'engagent à régler d'un commun accord tout ce qui a rapport à la navigation de cette rivière. Elles nommeront, à cet effet, des com-



general principles of this act of regulation (*règlement*) were founded upon a memoir of the celebrated Wilhelm von

missaires, qui se réuniront, au plus tard, six mois après la fin du Congrès, et qui prendront pour bases de leurs travaux les principes établis dans les articles suivants.

“Art. CIX. La navigation dans tout le cours des rivières indiquées dans l'article précédent, du point où chacune d'elles devient navigable jusqu'à son embouchure, sera entièrement libre, et ne pourra, sous le rapport du commerce, être interdite à personne; bien entendu que l'on se conformera aux règlements relatifs à la police de cette navigation; lesquels seront conçus d'une manière uniforme pour tous, et aussi favorable que possible au commerce de toutes les nations.

“Art. CX. Le système qui sera établi, tant pour la perception des droits que pour le maintien de la police, sera, autant que faire se pourra, le même pour tout le cours de la rivière, et s'étendra aussi, à moins que les circonstances particulières ne s'y opposent, sur ceux de ses embranchements et confluent qui, dans leur cours navigable, séparent ou traversent différents états.

“Art. CXI. Les droits sur la navigation seront fixés d'une manière uniforme, invariable, et assez indépendante de la qualité différente des marchandises pour ne pas rendre nécessaire un examen détaillé de la cargaison, autrement que pour cause de fraude et de contravention. La quotité de ces droits, qui, en aucun cas, ne pourront excéder ceux existant actuellement, sera déterminée d'après les circonstances locales, qui ne permettent guères d'établir une règle générale à cet égard. On partira néanmoins, en dressant le tarif, du point de vue d'encourager le commerce en facilitant la navigation, et l'octroi établi sur le Rhin pourra servir d'une norme approximative.

“Le tarif une fois réglé, il ne pourra plus être augmenté que par un arrangement commun des états riverains, ni la navigation grevée d'autres droits quelconques, outre ceux fixés dans le règlement.

“Art. CXII. Les bureaux de perception, dont on réduira autant que possible le nombre, seront fixés par le règlement, et il ne pourra s'y faire ensuite aucun changement que d'un commun accord, à moins qu'un des états riverains ne voulût diminuer le nombre de ceux qui lui appartiennent exclusivement.

“Art. CXIII. Chaque état riverain se chargera de l'entretien des chemins de hallage qui passent par son territoire, et des travaux nécessaires pour la même étendue dans le lit de la rivière, pour ne faire éprouver aucun obstacle à la navigation.

“Le règlement futur fixera la manière dont les états riverains devront concourir à ces derniers travaux, dans le cas où les deux rives appartiennent à différents gouvernements.

“Art. CXIV. On n'établira nulle part des droits d'étape, d'échelle, ou de relâche forcée. Quant à ceux qui existent déjà, ils ne seront conservés qu'en tant que les états riverains, sans avoir égard à l'intérêt local de

Humboldt (*u*), then the Prussian plenipotentiary, they were afterwards applied, by a series of articles, to the details of the tolls (*x*), *octroi*, police, and other matters incident to the navigation of rivers, and in particular to the Rhine, the Neckar, the Main, the Moselle, the Meuse, the Scheldt: the stipulations relating to the Meuse and the Scheldt were subsequently incorporated into the treaty of 1839, between the then independent kingdoms of Holland and Belgium.

l'endroit ou du pays où ils sont établis, les trouveraient nécessaires ou utiles à la navigation et au commerce en général.

"Art. CXV. Les douanes des états riverains n'auront rien de commun avec les droits de navigation. On empêchera, par des dispositions réglementaires, que l'exercice des fonctions des douaniers ne mette pas d'entraves à la navigation; mais on surveillera, par une police exacte sur la rive, toute tentative des habitants de faire la contrebande à l'aide des bateliers.

"Art. CXVI. Tout ce qui est indiqué dans les articles précédents sera déterminé par un règlement commun qui renfermera également tout ce qui aurait besoin d'être fixé ultérieurement. Le règlement, une fois arrêté, ne pourra être changé que du consentement de tous les états riverains, et ils auront soin de pourvoir à son exécution d'une manière convenable, et adaptée aux circonstances et aux localités.

"Art. CXVII. Les réglemens particuliers relatifs à la navigation du Rhin, du Neckar, du Mein, de la Moselle, de la Meuse et de l'Escaut, tels qu'ils se trouvent joints au présent acte, auront la même force et valeur que s'ils y avaient été textuellement insérés."

(*u*) *Wheaton's History*, p. 498.

(*x*) *Grotius*, l. ii. c. ii. xiv., observes generally upon the question of tolls: "Sed quæritur, an ita transeuntibus mercibus, terra, aut amne, aut parte maris, quæ terræ accessio dici possit, vectigalia imponi possint ab eo, qui in terra imperium habet. Certe quæcunque onera ad illas merces nullum habent respectum, ea mercibus istis imponi nulla æquitas patitur. Sic nec capitatio, civibus imposita ad sustentanda reipublicæ onera, ab exteris transeuntibus exigi potest. Sed si aut ad præstandam securitatem mercibus, aut inter cætera, etiam ob hoc onera sustinentur, ad ea compensanda vectigal aliquod imponi mercibus potest, dum modus causæ non excedatur." Upon this passage *Barbeyrac* remarks: "Cette raison et autres semblables ne font que rendre plus juste la levée des impôts. Mais indépendamment de tout cela on peut exiger quelque chose pour la simple permission de passer, qu'on n'étoit pas obligé d'accorder à la rigueur. Il est libre à tout propriétaire, par une suite du droit même de propriétaire, de n'accorder à autre que, moyennant un certain prix, l'usage de son bien." See also *Vattel*, l. i. c. x. pp. 103, 104, 128; l. ii. c. x. p. 362.

CLXV. Arrangements made in a similar spirit with respect to the free navigation of the Vistula, entered into, in May 1815, between Austria and Russia (y), and between Russia and Prussia, to which Austria subsequently acceded, and with respect to the rivers and canals of ancient Poland, were confirmed by the fourteenth article of the final diet of this Congress. Similar regulations were established with respect to the navigation of the Elbe, by a convention signed at Dresden, on June 23, 1821, by the States bordering on that river (*les Etats riverains*), and by an additional act signed by the same parties at Dresden, on April 13, 1844; a similar act was entered into by the States bordering on the Weser on September 10, 1843 (z). By the ninety-sixth article of the same Congress, the same general principles with respect to the free navigation of rivers were extended to the Po.

CLXVI. By a Treaty (a) between Spain and Portugal, signed at Lisbon on August 13, 1835, the perfect freedom of navigation of the river Douro was secured to the subjects of both the contracting Powers.

CLXVII. The Treaty of Bucharest in 1812 put an end to the hostilities which had been carried on between Russia and the Ottoman Empire since 1809. By the fourth article of that Treaty it was covenanted, that the boundary of Russia on the side of Turkey in Europe should be the Pruth, from the point where it joins the Danube, and the left bank of the Danube to its mouth into Kilia in the Black Sea; that the navigation of both rivers, according to these limits, should be equally free—the latter only having been so before—to the subjects of both empires; that no fortifications should be erected on the island in it; and that the right of fishing and cutting wood should also be

(y) Treaty between Austria and Russia as to the Dniester, March 19, 1810.

(z) *Martens, Nouv. Recueil*, tom. ix. p. 361.

(a) *Martens et de Cussy*, tom. iv. p. 123.

common to both countries (*b*). But by the Treaty of Paris, 1856 (*c*), the navigation of the noble and mighty Danube was subjected to the same public law to which other great rivers of Europe flowing through the territories of divers States had been subjected by the Treaty of Vienna (*d*). The extension of the principle of free navigation to this great artery of Europe is a fact of no light importance to the present and future welfare of mankind. By the Treaty of Adrianople (*e*) the *Sulina* channel of the Danube had been practically placed under the power of Russia. Much of the value of the navigation depends upon the state of this channel, about which great complaints had been justly made (*f*). This evil also has been remedied by the Treaty of Paris (1856), which appointed an European commission to examine and make regulations on the subject (*g*).

CLXVIIA. The General Treaty (*h*) for the European and Riverain Commissioners of the Danube was concluded between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, on March 30, 1856.

This Treaty contained, among other provisions, the following Articles:—

“ART. XV. (*i*). The Act of the Congress of Vienna “having established the principles intended to regulate the “navigation of rivers which separate or traverse different “States, the contracting Powers stipulate among themselves

(*b*) *Wheaton's Hist.* p. 504.

(*c*) Arts. xv.—xix.

(*d*) “Convention conclue le 25 (13) juillet, 1840, entre l'Autriche et la Russie, concernant la navigation du Danube.”—*Martens, Rec. de Traités, etc.* vol. xxx. p. 209.

(*e*) Art. 2, 1829.

(*f*) Correspondence with the Russian Government respecting obstructions to the navigation of the *Sulina* Channel of the Danube, in papers laid before Parliament, 1853.

(*g*) See a *règlement provisoire* made on July 9, 1860.—*Rec. gén. de Traités, Samwer* (cont. of *Martens*), t. iv. 2<sup>e</sup> partie, p. 118.

(*h*) See Papers relating to the navigation of the Danube, laid before Parliament, March 1, 1878. They extend from 1856 to 1878.

(*i*) French version laid before Parliament in 1856.

“that those principles shall in future be equally applied to  
“the Danube and its mouths. They declare that this arrangement henceforth forms a part of the public law of  
“Europe, and take it under their guarantee.

“The navigation of the Danube cannot be subjected to  
“any impediment or charge not expressly provided for by  
“the stipulations contained in the following Articles: in  
“consequence, there shall not be levied any toll founded  
“solely upon the fact of the navigation of the river, nor any  
“duty upon the goods which may be on board of vessels.  
“The regulations of police and of quarantine to be established for the safety of the States separated or traversed  
“by that river shall be so framed as to facilitate, as much as  
“possible, the passage of vessels. With the exception of  
“such regulations, no obstacle whatever shall be opposed to  
“free navigation.

“ART. XVI. With the view to carry into effect the  
“arrangements of the preceding article, a Commission, in  
“which Great Britain, Austria, France, Prussia, Russia,  
“Sardinia, and Turkey, shall each be represented by one  
“Delegate, shall be charged to designate and to cause to  
“be executed the works necessary below Isaktcha, to clear  
“the mouths of the Danube, as well as the neighbouring  
“parts of the sea, from the sands and other impediments  
“which obstruct them, in order to put that part of the river  
“and the said parts of the sea in the best possible state for  
“navigation.

“In order to cover the expenses of such works, as well as  
“of the establishments intended to secure and to facilitate  
“the navigation at the mouths of the Danube, fixed duties  
“of a suitable rate, settled by the Commission by a majority  
“of votes, may be levied, on the express condition that, in  
“this respect as in every other, the flags of all nations shall  
“be treated on the footing of perfect equality.”

There were various other Treaties, Conventions, and Conferences, which in the present state of circumstances it is unnecessary to mention, but a Treaty between Great

Britain, Germany (Prussia), Austria, France, Italy, Russia, and Turkey, for the revision of certain Stipulations of the Treaty of March 30, 1856, signed at London, March 13, 1871, contained the following among other provisions:—

“ART. IV. The Commission established by Article XVI. of the Treaty of Paris, in which the Powers who joined in signing the Treaty are each represented by a Delegate, and which was charged with the designation and execution of the works necessary below Isaktcha, to clear the mouths of the Danube, as well as the neighbouring parts of the Black Sea, from the sands and other impediments which obstruct them, in order to put that part of the river and the said parts of the sea in the best state for navigation, is maintained in its present composition. The duration of that Commission is fixed for a further period of twelve years, counting from April 24, 1871, that is to say, till April 24, 1883, being the term of the redemption of the loan contracted by that Commission, under the guarantee of Great Britain, Germany, Austria-Hungary, France, Italy, and Turkey.

“ART. V. The conditions of the re-assembling of the Riverain Commission, established by Article XVII. of the Treaty of Paris of March 30, 1856, shall be fixed by a previous understanding between the Riverain Powers, without prejudice to the clause relative to the three Danubian Principalities; and in so far as any modification of Article XVII. of the said Treaty may be involved, this latter shall form the subject of a special Convention between the co-signatory Powers.

“ART. VI. As the Powers which possess the shores of that part of the Danube where the Cataracts and the Iron Gates offer impediments to navigation reserve to themselves to come an understanding with the view of removing those impediments, the high contracting parties recognize from the present moment their right to levy a provisional tax on vessels of commerce of every flag which

“ may henceforth benefit thereby, until the extinction of  
 “ the debt contracted for the execution of the works; and  
 “ they declare Article XV. of the Treaty of Paris of 1856  
 “ to be inapplicable to that part of the river for a space of  
 “ time necessary for the repayment of the debt in ques-  
 “ tion.

“ ART. VII. All the works and establishments of every  
 “ kind created by the European Commission in execution  
 “ of the Treaty of Paris of 1856, or of the present Treaty,  
 “ shall continue to enjoy the same neutrality which has  
 “ hitherto protected them, and which shall be equally re-  
 “ spected for the future, under all circumstances, by the  
 “ high contracting parties. The benefits of the immunities  
 “ which result therefrom shall extend to the whole adminis-  
 “ trative and engineering staff of the Commission. It is,  
 “ however, well understood that the provisions of this Article  
 “ shall in no way affect the right of the Sublime Porte to  
 “ send, as heretofore, its vessels of war into the Danube in  
 “ its character of territorial Power.”

In 1875 a great number of regulations, in much detail, were agreed upon by the European Commission relating to the navigation and police of the Lower Danube, and the dues to be collected at the Sulina mouth; the Convention contained the following final provisions:—

“ ART. CLIV. The present regulation will enter into force  
 “ on March 1, 1876.

“ From the same day forward the regulation of navigation  
 “ and police, dated November 8, 1870, will cease to have  
 “ force of law.

“ ART. CLV. The present regulation may be modified,  
 “ according to need, by the European Commission or by the  
 “ International Authority which shall be substituted for it  
 “ in virtue of Article XVII. of the Treaty of Paris.

“ Done at Galatz, the 10th day of November, 1875.”  
 (Duly signed.)

CLXVIII. The expressions in the Treaties of Paris and

Vienna, stipulating for the free navigation of the Rhine "*jusqu'à la mer*," gave rise to a serious controversy between the Dutch Government and all the other Powers interested in the navigation of that river, except Baden and France; they supported the interpretation put upon these words by the Dutch. "To the sea," they contended, in the first place, did not mean "into the sea;" and, secondly, if the upper States were to insist so strictly upon words, then they must be contented with the course of the proper Rhine itself. The mass of water which forms the Rhine, dividing itself a little way above Nimeguen, is carried to the sea through three principal channels, the Waal, the Leck, and the Yssel: the first descending by Gorcum, where it changes its name for that of the Meuse; the second, farther to the north, approaching the sea at Rotterdam; and the third, taking a northerly course by Zutphen and Deventer to disgorge itself into the Zuyder Zee. None of these channels, however, is called or reckoned the Rhine; that name is preserved to a small stream which leaves the Leck at Wyck, takes its course by Utrecht and Leyden, gradually losing its waters, and dwindling away so as to be unable to reach the sea, disappears among the downs in the neighbourhood of Kulwyck. The Rhine itself, strictly speaking, being thus useless for the purposes of sea-navigation, it had been agreed between Holland and her neighbours to consider the Leck as the continuation of the Rhine; and the Government of the Netherlands afterwards consented that the Waal, as being deeper and better adapted to navigation, should be substituted for the Leck. Now the Waal, said the Government of Holland, terminates at Gorcum, to which the tide ascends; there consequently ends the Rhine; all that remains of that branch from Gorcum to Gravelingen, Helvoetsluys, and the mouth of the Meuse, is an arm of the sea, enclosed within our own territories, and therefore to be subjected to any imposts and regulations which we may think fit to establish. This interpretation, though supported, as has been remarked, by France and Baden, was strenuously opposed by all the



other Powers of Germany, who denounced it as an attempt to evade by chicane the plain meaning of the Treaty of Paris. Prussia addressed a memorial to the Great Powers who had been parties to the Treaty of Paris and the Congress of Vienna, calling upon them to state what had been the real meaning of that Treaty in regard to the navigation of the Rhine. The Allied Powers put upon the Treaty the same interpretation as the German States; but the Government of the Netherlands having returned an unfavourable answer to their joint remonstrance, the Austrian envoy at Brussels presented a note to that Court, in February 1826, in which he argued, that, " by the Treaty of Paris, the Allied Powers, " in conjunction with France, agreed that the sovereignty of " the House of Orange should receive an accession of ter- " ritory, and that the navigation of the Rhine, from the " point where it is navigable to the sea (*jusqu'à la mer*), " and *vice versa*, should be free. This last point was further " confirmed in the separate article, which provides ' that the " freedom of navigation in the Scheldt shall be established " on the same principles as those on which the navigation of " the Rhine is regulated by Article 5 of the present Treaty.' " The Allied Powers further reserved to themselves to deter- " mine, at the next Congress, the countries which should be " united with Holland, and declared ' that then the principles " should be discussed, upon which the tolls to be levied by " the States on the banks might be regulated in the most " uniform manner and most advantageously to the commerce " of all nations.' It appeared, from the simultaneous issuing " of these two resolutions, that, among other conditions " which the allies annexed to the incorporation of Belgium, " this increase of territory was combined on their side, even " before the establishment of the kingdom of the Netherlands, " with the above obligation to restore the freedom of the " navigation. There could certainly be no more express " and positive obligation than that which is united with the " foundation of a State, and which, in the present case, had " been fully sanctioned by the accession of the King of the

“ Netherlands to the Treaty of Paris, and the act of Congress  
“ at Vienna. It was inconceivable how the Government of  
“ the Netherlands could flatter itself with the hope of making  
“ a right obscure and doubtful, by prolix observations on the  
“ main resolution, and to do away with the principle of the  
“ free navigation of the Rhine, which was proclaimed in the  
“ face of the world in the first document of the political  
“ restoration of Europe, and on the same day when Holland  
“ was given up to the House of Orange.”

The Cabinet of Brussels replied by a repetition of the geographical argument, that the Rhine, properly so called, did not reach the sea ; and by an assertion, that the Republic of Holland had never ceased to exist *de jure*, and had preserved its existence under a monarch *de facto*, before the act of the Congress of Vienna, and before the treaties which incorporated with it the Catholic Netherlands. The outlets of the Rhine were certainly streams belonging to Holland, and to Holland only ; but the question was, whether the opening of these streams was not a part of the condition whereby Holland had gained the accession of the Belgic provinces, —whether they were not conferred and accepted on the understanding that the exclusive territorial right to the mouths of the Rhine should be modified and limited for the future. The reply of the Dutch Cabinet does not seem to meet this objection ; and it must be confessed that, to contend that the Rhine Proper is lost in a little brook, while two-thirds of its mighty volume of water are flowing on through the Waal and receiving the tributary Meuse, is a proposition which, however geographically accurate, cannot be very agreeable to the plain common sense of mankind. All that could be gained, however, at this time was a concession that the Leck should be considered as the Rhine, and that German vessels should be allowed to navigate it unmolested under no higher duties than might be imposed on other parts of the river, and that the prohibitions against the transit of goods should be abolished. Still, however, the main question—through what channel the Rhine “*jusqu'à*

“*la mer*” was to be navigated—remained in uncertainty; for the Leck ends at its junction with the Meuse before it reaches Rotterdam, and the Meuse was a river purely Belgic and Dutch (*j*).

But by the Treaty (*k*) concluded at Mayence, March 31, 1831, it was finally settled by all the riparian States of the Rhine, that this river should be free from the point where it is first navigable into the sea itself (*bis in die See*), and that the two outlets to the sea should be the *Leck* and the *Waal*—the passage through the Leck being by Rotterdam and Briel, and through the Waal by Dortrecht and Helvoetsluys—with the use of the canal between the latter place and Voovre. Various and particular regulations were made by this Treaty concerning police and tolls; and it was especially stipulated, that, if the aforesaid outlets to the sea should be dried up, the Government of the Netherlands, in whose dominions they were, should indicate other courses to the sea equal in convenience to those used for navigation by its own subjects.

CLXIX. On no occasion were the principles of this branch of International Law more elaborately discussed than in the cases of the great American rivers, the Mississippi and the St. Lawrence. By the Peace of Paris and Hubertsburg in 1763, France ceded Canada, and Spain ceded Florida, to Great Britain. France lost by this Treaty all her possessions in North America, Louisiana having been previously ceded to Spain as an indemnity for Florida. The boundary line between the British and French possessions in North America was drawn through the middle of the Mississippi, from its source to the Iberville, and through the Iberville and the lakes of Maurepos and Pontchartrain to the sea; and the free navigation of the Mississippi was secured

(*j*) *Annual Reg.* vol. lxxviii., year 1826, pp. 259–263.

(*k*) “Conventions entre les Gouvernements des Etats riverains du Rhin, et règlement relatif à la navigation du dit fleuve, conclus à Mayence le 31 mars 1831, et dont les ratifications ont été échangées réciproquement le 16 juin.”—*Martens, Rec. de Traités*, vol. xvii. p. 252.

to British subjects upon the ground, which has since proved to be erroneous in point of fact, that the Mississippi took its rise in the British territory. Subsequently France ceded Louisiana to Spain, and to the same Power Great Britain, at the Treaty of Versailles in 1783, "*retroceded*" (to use the language of the Treaty) Florida. Spain thus became sovereign over both banks of the river for a considerable distance above and at its mouth; and on this fact she built her claim to an exclusive navigation of the river below the point of the southern boundary of the United States.

The recognition of the independence of the United States was the object of the Treaty of 1783; and by the eighth Article it was provided that "the navigation of the river Mississippi shall for ever remain free and open to the subjects of Great Britain and the citizens of the United States." The United States therefore resisted the claim of Spain, taking their stand upon these Articles in the Treaties of 1763 and 1783, and also upon the general principles of International Law. They insisted that by this law a river was open to all riparian inhabitants, and that the upper inhabitants of a river had a right to descend the stream, in order to find an outlet for their produce; and, even if Spain possessed an *exclusive* dominion over the river between Florida and Louisiana, that an *innocent passage* over it was not the less on that account the right of the inhabitants of its upper banks. The dispute was ended in 1795 by the Treaty of San Lorenzo el Real: the fourth Article of which provided that the Mississippi should be open to the navigation of the citizens of the United States from its source to the ocean. By the twenty-second article they were permitted to deposit their goods at New Orleans, and to export them from thence on payment of warehouse hire.

The United States having acquired Louisiana, by the cession of Napoleon, on April 30, 1803 (*l*), and Florida by Treaty with Spain on February 22, 1819, thereby included within their territory the whole of this magni-

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(*l*) *Vide post.*

ficient stream, the Mississippi, from its source to the Gulf of Mexico. The stipulation in favour of British subjects, in the Article of the Treaty of 1783 was not renewed in the Treaty of Ghent, December 24, 1814; and it is therefore maintained by the United States that the *right* of navigating the Mississippi is vested exclusively in their subjects (*m*).

CLXX. The case of the navigation of the St. Lawrence was as follows (*n*):—

Great Britain possessed the northern shores of the lakes, and of the river in its whole extent to the sea, and also the southern bank of the river from the latitude forty-five degrees north to its mouth. The United States possessed the southern shores of the lakes, and of the St. Lawrence, to the point where their northern boundary touched the river. These two Governments were therefore placed pretty much in the same attitude towards each other, with respect to the navigation of the St. Lawrence, as the United States and Spain had been in with respect to the navigation of the Mississippi, before the acquisitions of Louisiana and Florida.

The argument on the part of the United States was much the same as that which they had employed with respect to the navigation of the Mississippi. They referred to the dispute about the opening of the Scheldt in 1784, and contended that, in the case of that river, the fact of the banks having been the creation of *artificial* labour was a much stronger reason, than could be said to exist in the case of the Mississippi, for closing the mouths of the sea adjoining

(*m*) *Wheaton's Hist.* p. 506-9; *Elém.* t. i. p. 185-6.

(*n*) *Wheaton's Hist.* 5, 12, 17, citing Mr. Secretary Clay's letter to Mr. Gallatin, American Minister in London, June 19, 1826.

*Congress Documents*, sess. 1827, 1828, No. 43.

*American Paper on the Navigation of the St. Lawrence.*—*Ib.* sess. 1827, 1828, No. 43.

*British Paper on the Navigation of the St. Lawrence.*

*Wheaton's Elém.* i. 187.

*State Papers (English)*, 1826-9.

*Times Newspaper*, Oct. 25, 26, 1850.

the Dutch Canals of the Sas and the Swin, and that this peculiarity probably caused the insertion of the stipulation in the Treaty of Westphalia; that the case of the St. Lawrence differed materially from that of the Scheldt, and fell directly under the principle of free navigation embodied in the Treaty of Vienna respecting the Rhine, the Neckar, the Main, the Moselle, the Meuse, and the Scheldt. But especially it was urged, and with a force which it must have been difficult to parry, that the present claim of the United States with respect to the navigation of the St. Lawrence was precisely of the same nature as that which Great Britain had put forward with respect to the navigation of the Mississippi when the mouth and lower shores of that river were in the possession of another State, and of which claim Great Britain had procured the recognition by the Treaty of Paris in 1763.

The principal argument contained in the reply of Great Britain was, that the liberty of passage by one nation through the dominions of another was, according to the doctrine of the most eminent writers upon International Law, a qualified occasional exception to the paramount rights of property; that it was what these writers called an *imperfect*, and not a *perfect* (o) right; that the Treaty of Vienna did not sanction this notion of a *natural* right to the free passage over rivers, but, on the contrary, the inference was that, not being a natural right, it required to be established by a *convention*; that the right of passage once conceded must hold good for other purposes besides those of trade in peace, for hostile purposes in time of war; that the United States could not consistently urge their claim on principle without being prepared to apply that principle, by way of reciprocity, in favour of British subjects, to the navigation of the Mississippi and the Hudson, to which access

(o) The inaccuracy of this phrase has been already noticed. It was intended to say that the navigation was a right not *stricti juris*, but a concession of *comity*.

might be had from Canada by land carriage or by the Canals of New York and Ohio.

The United States replied, that practically the St. Lawrence was a *strait* (*p*), and was subject to the same principles of law ; and that as *straits* are accessory to the seas which they unite, and therefore the right of navigating them is common to all nations, so the St. Lawrence connects with the ocean those great inland lakes, on the shores of which the subjects of the United States and Great Britain both dwell ; and, on the same principle, the natural link of the *river*, like the natural link of the *strait*, must be equally available for the purposes of passage by both. The passage over land, which was always pressing upon the minds of the writers on International Law, is intrinsically different from a passage over water ; in the latter instance, no detriment or inconvenience can be sustained by the country to which it belongs. The track of the ship is effaced as soon as made ; the track of an army may leave serious and lasting injury behind. The United States would not “shrink” from the application of the analogy with respect to the navigation of the Mississippi, and whenever a connection was effected between it and Upper Canada, similar to that existing between the United States and the St. Lawrence, the same principle should be applied. It was, however, to be recollected, that the case of rivers which both rise and disembogue themselves within the limits of the same nation is very distinguishable, upon principle, from that of rivers which, having their sources and navigable portions of their streams in States above, discharge themselves within the limits of *other* States below.

Lastly, the fact, that the free navigation of rivers had been made a matter of *convention* did not disprove that this navigation was a matter of *natural right* restored to its proper position by treaty.

The result of this controversy for many years produced no effect. Great Britain maintained her exclusive right. The

United States still remained debarred from the use of this great highway, and were not permitted to carry over it the produce of the vast and rich territories which border on the lakes above to the Atlantic Ocean.

It seems difficult to deny that Great Britain may have grounded her refusal upon strict Law; but it is at least equally difficult to deny, first, that in so doing she put in force an extreme and hard law; secondly, that her conduct with respect to the navigation of the St. Lawrence was inconsistent with her conduct with respect to the navigation of the Mississippi. On the ground that she possessed a small tract of domain in which the Mississippi took its rise, she insisted on her right to navigate the entire volume of its waters: on the ground that she possessed both banks of the St. Lawrence where it disembogued itself into the sea, she denied to the United States the right of navigation, though about one half of the waters of Lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan through which the river flows, were the property of the United States.

Any blame, however, attaching to the conduct of Great Britain, was removed by the Reciprocity Treaty of June 5, 1854, which provided by Article IV. as follows:—"It is agreed that the citizens and inhabitants of the United States shall have a right to navigate the river St. Lawrence and the Canals of Canada, used as the means of communicating between the great lakes and the Atlantic Ocean, with their vessels, boats, and crafts, as fully and freely as the subjects of her Britannic Majesty; subject only to the same tolls and other assessments as now are or hereafter may be exacted of her Majesty's said subjects; it being understood, however, that the British Government retains the right of suspending this privilege on giving due notice thereof to the Government of the United States; that if at any time the British Government should exercise the said reserved right, the Government of the United States shall have the right of suspending, if it



“ think fit, the operation of Article III. of the present  
 “ Treaty, in so far as the province of Canada is affected  
 “ thereby, for so long as the suspension of the free navi-  
 “ gation of the river St. Lawrence or the canals may con-  
 “ tinue; that British subjects shall have the right freely to  
 “ navigate Lake Michigan with their vessels, boats, and  
 “ crafts, so long as the privilege of navigating the river  
 “ St. Lawrence, secured to American citizens by the above  
 “ clause of the present article, shall continue; and the  
 “ Government of the United States further engages to urge  
 “ upon the State governments to secure to the subjects of  
 “ her Britannic Majesty the use of the several State canals  
 “ on terms of equality with the inhabitants of the United  
 “ States; and that no export duty, or other duty, shall be  
 “ levied on lumber or timber of any kind, cut on that portion  
 “ of the American territory in the State of Maine, watered  
 “ by the river St. John and its tributaries, and floated down  
 “ that river to the sea where the same is shipped to the  
 “ United States from the province of New Brunswick” (q).

On January 18, 1865, the President of the United States put an end to this Treaty, in pursuance of a Resolution of Congress, availing himself of a provision in the Treaty, ten years having elapsed since its execution (r).

CLXXI. The Uruguay and Parana have been opened to all merchant vessels by a Treaty of July 10, 1858, between the United States and the Argentine Confederation, and by a Treaty, May 13, 1858, between the United States and Bolivia. The latter country declares “that, in accordance with fixed principles of International Law, it regards the Amazon and La Plata, with their tributaries, as highways or channels opened by nature on the commerce of all nations.” Ecuador, November 26, 1858, has declared her rivers free. Peru appears to have

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(q) *Hertslet's Treaties*, vol. ix. 998, x. 647, xi. 808.

See Address of President Pierce, 1853, *Ann. Reg.* for that year, p. 414.

See *Lawrence's Wheaton*, n. 114, p. 361.

(r) *Dani's Wheaton*, p. 181; *U. S. Laws*, xiii. 566.

still a controversy as to the Peruvian tributaries of the Amazon (*s*).

CLXXII. The question, whether the *open sea*, or *main ocean*, could be appropriated (*t*) by any State to the exclusion of others, has been the subject of celebrated controversies. Spain and Portugal, at different epochs, have claimed exclusive right, founded upon the titles of previous discovery, possession, and Papal grants, to the navigation, commerce, and fisheries of the Atlantic and Pacific Oceans. The *Mare Liberum* (*u*), written by Grotius in 1609, the chief object of which was to demonstrate the injustice of the Portuguese pretensions, founded on their discovery of the Cape of Good Hope, to the exclusive navigation of the African and the Indian seas,—the *Mare Clausum*, written by our own countryman Selden, to establish the exclusive right of Great Britain to the British seas,—Puffendorf, in the fifth chapter of his fourth book “*De Jure Naturali Gentium*,”—and the essay of Bynkershock in 1702, *De Dominio Maris*, have exhausted this theme (*x*). It is sufficient

(*s*) *Dana's Wheaton*, 204–5.

President Pierce's Message to United States, 1853; *Ann. Reg.* 1853, p. 323.

*Lawrence's Wheaton*, 360, n. 114.

See *Speech of the Earl of Clarendon, Secretary of Foreign Affairs, in the House of Lords*, June 3, 1853.—*Hansard's Parl. Deb.* vol. cxxvii. No. 6, pp. 1073–4.

(*t*) *Albericus Gentilis*, lib. i. c. viii. *Advocationes Hispanicæ*, maintains (in 1613) the claim of Great Britain to the Narrow Seas.

*Wheaton's Law of Nations*, 1, 225–9.

*Vattel*, lib. i. c. xxiii.

*Martens*, lib. ii. c. i. s. 43. *De l'Océan*, lib. iv. c. iv. s. 157. *Droits sur l'Océan et sur la Mer des Indes*.

*Günther*, ii. p. 28. “Das Hauptwerk hierbei kommt darauf an, dass man die offene See, oder das grosse Weltmeer von den einzelnen Theilen desselben, die an oder zwischen die Länder der Nationen gehen, unterscheide.”

(*u*) A noble work, which cannot now be read without profit to the reader and admiration for the writer. It was dedicated “*Ad Principes Populosque liberos Orbis Christiani*.”

(*x*) When the Spanish envoy, Mendoza, complained to the Queen Elizabeth that English ships presumed to trade in the Indian Seas, that

to say, that the reason of the thing, the preponderance of authority, and the practice of nations, have decided, that the *main ocean*, inasmuch as it is the necessary highway of all nations, and is from its nature incapable of being continuously possessed, cannot be the property of any one State. "Igitur quicquid dicat Titius, quicquid Mævius, ex possessione jure naturali et gentium suspenditur dominium, nisi pacta dominium, citra possessionem, defendant, ut defendit jus cujusque civitatis proprium" (y). It is possible, as is indeed apparent from this citation, that a nation may acquire exclusive right of *navigation* and *fishing* of the main ocean *as against another nation*, by virtue of the specific provisions of a treaty; for it is competent to a nation to renounce a portion of its rights; and there have been instances of such renunciation, both in ancient and modern times.

CLXXIII. The treaty of peace, justly called "famous" by Demosthenes (z) and Plutarch (a), whereby the Athenians extorted from the Persians a pledge that they would not approach the Greek sea within the space of a day's journey on horseback, and that no ship of war should sail between the

queen gave for answer,—"That she saw no reason that could exclude her, or other nations, from navigating to the Indies, since she did not acknowledge any prerogative that Spain might claim to that effect, and much less any right in it to prescribe laws to those who owed it no obedience, or to debar them trade. That the English navigated on the ocean, the use of which was like that of the air, common to all men, and which, by the very nature of it, could not fall within the possession or property of any one."—*Cumt. in Vita Elizabeth, ad ann. 1580, p. m. 328 et seq.*

(y) *Bynkershoek, Opera*, t. vi. p. 361.

(z) Καλλίαν τὸν Ἱππονίκου, τὸν ταύτην τὴν ὑπὸ πάντων θρυλλομένην εἰρήνην πρεσβεύσαντα, ἵππου μὲν δρόμον ἡμέρας πεζῇ μὴ καταβαίνειν ἐπὶ τὴν θάλατταν βασιλεία ἐντὸς δὲ Χελιδονέων καὶ Κυνάεων πλοῖα μακρῶ μὴ πλεῖν.—*Orat. de falsa Legat., Demosth.*

(a) Τοῦτο τὸ ἔργον οὕτως ἐταπείνωσε τὴν γνώμην τοῦ βασιλέως, ὥστε συνθέσθαι τὴν περιβόητον εἰρήνην ἐκείνην, ἵππου μὲν δρόμον αἰετὶ τῆς Ἑλληνικῆς ἀπέχειν θαλάσσης, ἐνδον δὲ Κυνάεων καὶ Χελιδονέων μακρὰ νηὶ καὶ χαλκεμβύλῳ μὴ πλεῖν.—*Plutarch. in vita Cimon.*

(*Protius*, l. ii. c. iii. s. 15.

*Vattel*, l. i. c. xxiii. s. 284.

Cyanean and Chelidonian isles; the treaties whereby the Carthaginians bound the Romans not to navigate the Mediterranean beyond a certain point, and whereby the Romans imposed restrictions of the like kind upon the Illyrians, and on King Antiochus;—these are memorable examples of the voluntary resignation of a nation's intrinsic rights.

So, in modern times, the House of Austria (*b*) has renounced, in favour both of the English and Dutch, her right to send ships from the Belgic provinces to the East Indies; and the Dutch attempted to interdict Spanish ships, sailing to the Philippine Islands, from doubling the Cape of Good Hope.

CLXXIV. Instances of this kind, however, are far from proving that the main ocean is capable of becoming property. "Possunt enim ut singuli" (Grotius truly remarks) "ita et populi pactis, non tantum de jure quod proprie sibi competit, sed et de eo quod cum omnibus hominibus commune habent, in gratiam ejus cujus id interest decedere" (*c*). He illustrates this position, according to his wont, by a reference to the Roman Law. A person sold his maritime farm with the condition that the purchaser should not fish for *thunnies* to the prejudice of another maritime farm, which the seller retained in his possession. Upon this case Ulpian gave his opinion that, although the sea belonged to the class of things which could not be subjected to a *servitus* (*d*) of this kind,

(*b*) *Traité de Vienne*, 16 mars 1731, Art. 5.

(*c*) *Grotius*, l. ii. c. iii. s. 15.

*Vattel*, l. i. c. xxiii. s. 284.

*Barbeyrac* remarks in a note on this passage: "Cela est vrai; mais rien n'empêche aussi que, quand on fait des traités comme ceux dont il s'agit, on n'ait dessein de s'assurer par là la propriété de quelque mer, et d'obliger les autres à la reconnoître. M. Vittrarius, dans son Abrégé de notre auteur (l. ii. c. iii. s. 18), prétend que, si celui qui fait un tel traité étoit déjà maître de la mer dont il veut que l'autre s'éloigne, il ne seroit pas nécessaire de stipuler une telle clause. Mais il ne s'est pas souvenu de ce qu'il établit lui-même, après notre auteur (l. ii. c. xv.), qu'il y a des traités qui roulent sur des choses déjà dues, même par le Droit naturel."

(*d*) *Dig.* l. viii. t. iv. leg. 13: "Venditor fundi Geroniam fundo Ba-

yet the *bona fides* of the contract required that the restriction should be binding against the purchaser, and those who succeeded to his rights and estates.

The right of navigation, fishing, and the like, upon the open sea, being *jura meræ facultatis*, rights which do not require a continuous exercise to maintain their validity, but which may or may not be exercised according to the free will and pleasure of those entitled to them, can neither be lost by *non-user* or *prescribed* against, nor acquired to the exclusion of others by having been immemorially exercised by one nation only. No presumption can arise that those who have not hitherto exercised such rights have abandoned the intention of ever doing so (*e*).

CLXXV. But though no presumption can arise, it is the opinion of Vattel—who holds most explicitly, in more than one part of his work, the doctrine which has just been laid down—that such non-user on the part of other nations may possibly, under certain circumstances, become clothed with the character of a *tacit consent and convention*, which may found a title in one nation to exercise such rights to the

triano, quem retinebat, legem dederat, ne contra eum piscatio thynuarum exerceretur. Quamvis mari, quod natura omnibus patet, servitus imponi privata lege non potest, quia tamen bona fides contractus legem servari venditionis exposcit, personæ possidentium aut in jus eorum succedentium per stipulationis vel venditionis legem obligantur.”

(*e*) Vattel, l. i. c. viii. s. 95: “Si les droits touchant le commerce sont sujets à la prescription.”

Lib. i. c. xxiii. s. 285-6.

Puffendorf, *Jur. Nat. et Gent.* l. iv. c. v. s. 5.

Heffters, s. 74: “Sogar ein unvordenklicher Besitzstand, wenn er nicht ein freiwilliges Zugeständniss anderer Nationen deutlich erkennen lässt, vermag keine ausschliesslichen Befugnisse bei solchen *res meræ facultatis* zu ertheilen.”

Wheaton's *Elements*, vol. i. p. 228: “The authority of Vattel would be full and explicit to the same purpose, were it not weakened by the concession, that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favour of one nation against another.”

exclusion of others. “ Qu’une nation en possession de la  
 “ navigation et de la pêche en certains parages y prétende  
 “ un droit exclusif, et défende à d’autres d’y prendre part ; si  
 “ celles-ci obéissent à cette défense, avec des marques suffi-  
 “ santes d’acquiescement, elles renoncent tacitement à leur  
 “ droit en faveur de celle-là, et lui en établissent un, qu’elle  
 “ peut légitimement soutenir contre elles dans la suite, sur-  
 “ tout lorsqu’il est confirmé par un long usage ” (f).

CLXXVI. Mr. Wheaton does not appear to agree with the qualification of the doctrine contained in the passage just cited ; but the reasoning of Vattel does not seem to be unsound : the case for its application is not often likely to occur.

CLXXVII. In 1790, May 25 (g), Lord Grenville vindicated the British *dominium* over Nootka Sound against the Spaniards. In a message laid before both Houses of Parliament it was said that “ his Majesty has received informa-  
 “ tion, that two vessels belonging to his Majesty’s subjects,  
 “ and navigated under the British flag ; and two others, of  
 “ which the description is not hitherto sufficiently ascertained,  
 “ have been captured at Nootka Sound, on the North-western  
 “ coast of America, by an officer commanding two Spanish  
 “ ships of war ; that the cargoes of the British vessels have  
 “ been seized, and that their officers and crews have been  
 “ sent as prisoners to a Spanish port.

“ The capture of one of these vessels had before been  
 “ notified by the Ambassador of his Catholic Majesty, by  
 “ order of his Court, who, at the same time, desired that  
 “ measures might be taken for preventing his Majesty’s  
 “ subjects from frequenting those coasts which were alleged  
 “ to have been previously occupied and frequented by the  
 “ subjects of Spain. Complaints were also made of the  
 “ fisheries carried on by his Majesty’s subjects in the seas  
 “ adjoining to the Spanish continent, as being contrary to

(f) *Vattel, Le Droit des Gens*, t. i. l. i. c. xxiii. s. 286.

(g) *Annual Register*, vol. xxxii. 1790.

“ the rights of the Crown of Spain. In consequence of this  
“ communication, a demand was immediately made, by his  
“ Majesty’s order, for adequate satisfaction, and for the  
“ restitution of the vessel previous to any other discussion.

“ By the answer from the Court of Spain, it appears that  
“ this vessel and her crew had been set at liberty by the  
“ Viceroy of Mexico; but this is represented to have been  
“ done by him on the supposition that nothing but the  
“ ignorance of the rights of Spain encouraged the individuals  
“ of other nations to come to those coasts for the purpose of  
“ making establishments, or carrying on trade; and in con-  
“ formity to his previous instructions, requiring him to show  
“ all possible regard to the British nation.

“ No satisfaction is made or offered, and a direct claim is  
“ asserted by the Court of Spain to the exclusive rights of  
“ sovereignty, navigation, and commerce in the territories,  
“ coasts, and seas in that part of the world.

“ His Majesty has now directed his minister at Madrid to  
“ make a fresh representation on this subject, and to claim  
“ such full and adequate satisfaction as the nature of the  
“ case evidently requires. And, under these circumstances,  
“ his Majesty, having also received information that consider-  
“ able armaments are carrying on in the ports of Spain, has  
“ judged it indispensably necessary to give orders for making  
“ such preparations as may put it in his Majesty’s power to  
“ act with vigour and effect in support of the honour of his  
“ Crown and the interests of his people. And his Majesty  
“ recommends it to his faithful Commons, on whose zeal and  
“ public spirit he has the most perfect reliance, to enable  
“ him to take such measures, and to make such augmenta-  
“ tion of his forces, as may be eventually necessary for this  
“ purpose.

“ It is his Majesty’s earnest wish, that the justice of his  
“ Majesty’s demands may ensure, from the wisdom and  
“ equity of his Catholic Majesty, the satisfaction which is  
“ so unquestionably due; and that this affair may be ter-  
“ minated in such a manner as to prevent any grounds of

“misunderstanding in future, and to continue and confirm  
 “that harmony and friendship which has so happily subsisted  
 “between the two Courts, and which his Majesty will  
 “always endeavour to maintain and improve by all such  
 “means as are consistent with the dignity of his Majesty’s  
 “Crown, and the essential interests of his subjects.” The  
 dispute was terminated by the Nootka Sound Convention,  
 the importance of which was much insisted upon in the dis-  
 cussions between Great Britain and the North American  
 United States relative to the question of the Oregon bound-  
 ary (*h*).

CLXXVIII. Upon April 17, 1824 (*i*), a Convention  
 was entered into at St. Petersburg, between the United  
 States of America and Russia, respecting the navigation  
 of the Pacific Ocean, and the forming of settlements upon  
 the north-western shores of America. By this Convention  
 it was agreed generally, that the subjects of both countries  
 might freely navigate the Pacific, or South Sea, occupy  
 shores as yet unoccupied, and enter into commerce with  
 the native inhabitants; and it was stipulated that for the  
 future it should be unlawful for the subjects of the United  
 States to make any settlement on the north-west coast of  
 America, or of the adjacent isles, “*au nord du cinquante-*  
 “*quatrième degré et quarante minutes de latitude septentri-*  
 “*onale* ;” and for any subjects of Russia to make any settle-  
 ment “*au sud le la même parallèle*” (*j*). This Convention  
 therefore restricted the natural rights of these two countries;  
 but it could not extend beyond them, or have any effect, *per*  
*se*, upon other countries.

CLXXIX. Denmark (*h*) has not always confined her  
 pretensions of sovereignty to the narrow sea of the Baltic,  
 but has also extended them to the open North Sea (*l*). Queen

(*h*) *Vide post*.

(*i*) Ratified January 11, 1825.

(*j*) *Martens et de Cussy, Recueil de Traités*, t. iii. p. 659.

(*k*) *Schlegel, Staatsrecht Dänemarks*.

(*l*) *Vide post*, § clxxxix.



Elizabeth complained, in a letter which she wrote to the King of Denmark, in 1600, of the manner in which British vessels were prevented from fishing in this sea, maintaining their right to do so as resting upon an undoubted principle of law (*m*).

At a very early period Denmark considered herself entitled to the sovereignty or *dominium* over the whole Sound, and always founded her right to Sound dues not only on the Treaties concluded with several States, but also and principally upon this *dominium*.

It was as a recognition of this *dominium* that Denmark exacted a salute to Kronborg from every man-of-war passing through the Sound as well when they went along the Swedish as when they went along the Danish coast. The salute was given by Swedish men of war, even after Sweden had by the peace of Copenhagen not only gained possession of Scania, but also been exempted from the payment of Sound dues. This last advantage, however, was lost to her in 1720.

After the peace of Copenhagen, 1660, Denmark never claimed possession of the whole of the Sound, but admitted that Sweden, with the exception of the duty to salute Kronborg, possessed the *jus littoris*, that is, the *dominium* over the sea near the coast of Scania.

Since the Treaty of 1857, it has become a question of purely historical interest, how far and how long the *dominium* of Denmark was recognized by other States. I incline, however, to believe that the supremacy claimed by Denmark over the Sound and the two Belts, through which the Baltic Sea finds its way into the ocean, was founded upon the valid international title of immemorial prescription confirmed by

(*m*) "Regiam proinde protectionem nostram implorant, atque humiliter supplicant ne ab honestissima hac vivendi ratione (cui jam inde a primis annis assueverunt), alti nempe maris piscatione, Jure Gentium omniumque Nationum moribus libera, excludi illos facile permittamus."—*Rymer, Fœd.* t. xvi. p. 395: "A Regina ad Regem Daniæ; super Piscatione in Alto Mari permittenda."

many treaties with various Maritime States. The dues, however, which Denmark levied upon ships passing these straits had long been the object of much complaint and the cause of much irritation to foreign States, and had become in fact very injurious to trade, owing to the detention of vessels which the collection of these dues occasioned. In 1857 the whole subject was happily adjusted by Treaty with the Great European Powers. The right of Denmark to levy these dues was not distinctly recognized, but compensation was made to her by payment of a capital sum (*n*) on the ground of indemnity for maintaining lights and buoys, which Denmark stipulated to maintain and to levy no further duties. The United States declined to take any part in this European Convention for what President Pierce considered "the most cogent reasons." He stated—"One is, that Denmark does not offer to submit "to the Convention the question of her right to levy the "Sound dues. A second is, that if the Convention were "allowed to take cognizance of that particular question, "still it would not be competent to deal with the great "international principle involved, which affects the right "in other cases of navigation and commercial freedom, as "well as that of access to the Baltic. Above all, by the "express terms of the proposition, it is contemplated that "the consideration of the Sound dues shall be commingled "with and made subordinate to a matter wholly extraneous—"the balance of power among the Governments of Europe. "While, however, rejecting this proposition, and insisting "on the right of free transit into and from the Baltic, I have "expressed to Denmark a willingness on the part of the "United States to share liberally with other Powers in compensating her for any advantages which commerce shall "hereafter derive from expenditures made by her for the "improvement and safety of the navigation of the Sound or

(*n*) The sum paid by Great Britain was a million and a quarter.

“Belts”(o). Accordingly a separate Treaty was made between the United States and Denmark, April 11, 1857, by which Denmark declared the Baltic open to American vessels, and stipulated to maintain buoys and lights and furnish pilots, if desired, for which she received a certain sum of money.

Since the making of these Treaties it would be difficult to maintain that Denmark now possesses any other dominion over the Sound than that which every State possesses over the sea along its coasts. The Declaration of August 15, 1873, was apparently only intended to regulate pilotage, and the statement in Article IV. of the Declaration, that it does not in the least put any restrictions on the dominion over the sea near the coasts belonging to each Power respectively, according to the principles of International Law, can now scarcely admit of any other construction than that Denmark and Sweden equally possess the usual and ordinary rights of the *jus littoris*.

(o) See *Ann. Reg.* for 1855, p. 291. *Hertslet's Treaties*, x. pp. 736, 742, 743. *Dana's Wheaton*, p. 185, n. 112. *Laurence's Wheaton*, p. 333, n. 110.

## CHAPTER VI.

## NARROW SEAS, AS DISTINGUISHED FROM THE OCEAN.

CLXXX. CLAIMS have been preferred by different nations to the exclusive dominion over *the seas surrounding their country*: if not to every part of such seas, to an extent far beyond the limits assigned in the foregoing paragraphs.

This kind of claim is distinguished from the claim of jurisdiction over the *ocean* by being confined to what are called *the narrow or adjacent seas*, they not being (it is contended), like the ocean, the great highway of the nation. It is further distinguished from the case of the *Straits* which has just been discussed, by the fact of the claimants not possessing the opposite shore.

CLXXXI. This claim is rested upon immemorial usage, upon national records, upon concessions of other States, upon the language of treaties. Considering the nature of the claim, and of the subject over which it is to be exercised, it cannot be built securely upon a less foundation than the express provisions of positive treaty, and can be valid only against those nations who have signed such treaty. "There may, by legal possibility" (as Lord Stowell says) (a), "exist a peculiar property excluding the universal or common use;" but the strongest presumption of law is adverse to any such pretension. The Portuguese affected at one time to prevent any foreign vessel from navigating the African seas near the Bissagos Islands: and it is known that Great Britain once laid claim to exclusive right of property and

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(a) *The Twee Gebraders*, 3 C. Rob. Adm. Rep. 339.

*Das Britannische Meer*, Günther, vol. ii. s. 20, p. 30.

jurisdiction, not merely over the British Channel extending from the island of *Ouessant* to the *Pas de Calais*, but over the four seas which surround her coasts (*b*). Nor was this only while the Duchy of Normandy was held with the British dominions; or even while Calais, or the *Pas de Calais*, belonged to Great Britain, a circumstance of considerable weight with respect to their claim. Albericus Gentilis, in one of his *Advocationes Hispanicæ* (*c*), published in 1613, supports these pretensions. Queen Elizabeth seized upon some Hanseatic vessels lying at anchor off Lisbon for having passed through the sea north of Scotland without her permission.

CLXXXII. In support of this doctrine, Selden (*d*) wrote his celebrated *Mare Clausum*, in which he sought to establish two propositions:—1. That the sea might be property. 2. That the *seus* which washed the shores of Great Britain and Ireland were subject to her sovereignty even as far as the northern pole.

The opinions of jurists, as well as the practice of nations, have decided, that this work did not refute the contrary positions laid down by Grotius in his *Mare Liberum*, to which it purported to be an answer. Selden dedicated his work to Charles I.; and so fully did that monarch imbibe its principles, that in 1619 he instructed Carleton, the British ambassador, to complain to the States General of the Dutch provinces of the audacity of Grotius in publishing his *Mare Liberum*, and to demand that he should be punished. Not less agreeable was this doctrine to Cromwell and the Republican Parliament. They made war upon the Dutch to

(*b*) *Wheaton's Hist.* Part. i. s. 18, p. 152, &c., contains a clear and valuable account.

(*c*) Lib. i. cap. viii.

(*d*) *Joh. Seldeni Mare Clausum, sive de Dominio Maris*, lib. ii.: "*Primo, mare ex jure nature sive gentium hominum non esse commune, sed domini privati sive proprietatis capax pariter ac tellurem esse demonstratur. Secundo, Serenissimum Magnæ Britanniae Regem maris circumflui ut individuae atque perpetuæ Imperii Britannici appendicis dominum esse asseritur.*"

compel them to acknowledge the British empire over these seas, (e).

CLXXXIII. The rights occasionally claimed by Great Britain in these seas were chiefly those of exclusive fishing, and of exacting the homage of salute from all common vessels. But it is very remarkable that Sir Leoline Jenkins, who was in fact the expounder of all international law to the Government of Charles II. and James II., appears never to have insisted upon these extravagant demands, but to have confined the rights of his country within the just and moderate limits which have been already stated.

CLXXXIV. It is true that the Dutch appear to have occasionally admitted the exclusive right of fishery, by making payment and taking out licences to fish—payment and licences which were afterwards suspended by Treaties between England and the Burgundian princes. It is true that, by the fourth Article of the Treaty of Westminster, concluded in 1674, the Dutch conceded the homage of the flag in the amplest manner to the English. “It was carried” (says Sir W. Temple, the negotiator of the Treaty) “to all the height his Majesty could wish; and thereby a claim of the crown, the acknowledgment of its dominion in the Narrow Seas, allowed by treaty from the most powerful of our neighbours at sea, which had never yet been yielded to by the weakest of them that I remember in the whole course of our pretence; and had served hitherto but for an occasion of quarrel, whenever we or they had a mind to it, upon either reasons or conjectures” (f).

(e) *Comte de Garden, Traité de Diplom. t. i. p. 402.*

(f) “*Prædicti Ordines Generales Unitarum Provinciarum debite ex parte sua agnoscentes jus supramemorati Serenissimi Domini Magnæ Britanniae Regis, ut vexillo suo in muribus infra nominandis honos habeatur, declarabunt et declarant, concordabunt et concordant, quod quaecunque naves aut navigia ad præfatas Unitas Provincias spectantia, sive naves bellicæ, sive aliæ, eoque vel singulæ vel in classibus conjunctæ, in ullis muribus a Promontorio *Finis Terræ* dicto usque ad medium punctum terræ *van Staten* dictæ in Norwegia, quibuslibet navibus aut navigiis ad Serenissimum Dominum Magnæ Britanniae Regem spectan-*

CLXXXV. Upon this concession, so humiliating to the countrymen of Ruyter and Van Tromp, so little to be expected by those who in 1667 had demolished Sheerness and set fire to Chatham, Bynkershoek (*g*) ingeniously remarks: "Usu scilicet maris et fructu contenti Ordines, aliorum ambitioni, sibi non damnosæ, haud difficulter cedunt." And in his Treatise *De Dominio Maris*, published in 1702, and before the work from which the extract just cited is taken, he observes, on this Article of the Treaty: "Sed quod ita accipiendum est, ut omnes pactiones, quas, ut bello abstineatur, paciscimur, nempe Anglis id competere, quia in id convenit, per se enim nihil in eo mari habent, præcipuum. Porro ut ita hoc accepi velim ut ne credamus Belgas eo ipso Anglis concessisse illius maris dominium, nam aliud est se subditum profiteri, aliud majestatem alicujus populi comiter conservare (ut hæc explicat *Proculus* in Dig. xlix. t. 15, 7, de *Captiv. et Postlim.*); fit hoc, ut intelligamus alterum populum superiorem esse, non ut intelligamus, alterum non esse liberum" (*h*).

CLXXXVI. France, however, as Mr. Wheaton observes, never formally acknowledged the British pretension. Louis XV. published an ordinance on April 15, 1689, not only forbidding his naval officers from saluting the vessels of other princes bearing a flag of equal rank, but, on the con-

tibus se obviam dederint, sive illæ naves singulæ sint, vel in numero majori, si majestatis suæ Britannicæ aplustrum sive vexillum *Jack* appellatum gerant, prædictæ Unitarum Provinciarum naves aut navigia vexillum suum e mali vertice detrahent et supremum velum denittent, eodem modo parique honoris testimonio, quo ullo unquam tempore aut in illo loco antehac usitatum fuit, versus ullas Majestatis suæ Britannicæ aut antecessorum suorum naves ab ullis Ordinum Generalium saorumve antecessorum navibus."—*Tractatus Pacis inter Carolum II. Regem Magnæ Britannicæ et Ordines Generales fœderati Belgii*, 1674, Art. 4.

*Bynkershoek, Quæst. J. P. l. ii. c. xxi.*

*Temple's Memoirs*, ii. p. 250.

*Hume*, vol. vi. c. lii.

*Wheaton's Hist.* pp. 155–6.

(*g*) *Quæst. J. P. lib. i. cap. xxi.*

(*h*) *De Dominio Maris*, cap. v.

trary, enjoining them to require the salute from foreign vessels in such a case, and to compel them by force, in whatever seas and on whatever coasts they might be found. This ordinance was plainly levelled at England. Accordingly, in the manifesto published by William III. on May 27, 1689, he alleged this insult to the British flag as one of the motives for declaring war against France (*i*).

CLXXXVII. In another part of his very able treatise, Bynkershoek clearly and irrefragably lays down the principles of law applicable to the occupation of the sea:—"Totum, "qua patet, mare non minus jure naturali cedebat occupanti, "quam terra quævis, aut terræ mare proximum. Sed diffi- "cilior occupatio, difficillima possessio; utraque tamen "necessaria ad asserendum dominium, jure videlicet gentium, "ad quod ea disputatio unice exigenda est. Nam ex iis, "quæ cap. 1 enarravimus, certum est consequi, dominium "maris prima ab origine non fuisse quæsitum nisi occupa- "tione, hoc est, navigatione eo animo instituta, ut qui libera "per vacuum ponit vestigia princeps, ejus, quod navigat, "maris esse velit dominus; certum est et porro consequi, "non aliter id dominium retinere, quam possessione perpetua, "hoc est, navigatione, quæ perpetuo exercetur ad custodiam "maris, si exterum est, habendam: ea namque remissa, "remittitur dominium, et redit mare in causam pristinam, "atque ita rursus occupanti primum cedit" (*j*).

CLXXXVIII. Thus the opinion of Sir Leoline Jenkins and Bynkershoek are in harmony upon this question; and in spite of the proclamation of William III. it does not appear

(*i*) *Valin, Commentaire sur l'Ordonnance de la Marine*, liv. v. tit. 1, p. 689: De la Liberté de la Pêche: "Que le droit de pavillon, qui appartient à la couronne d'Angleterre, a été disputé par son ordre (de Louis XIV); ce qui tend à la violation de notre souveraineté sur la mer, laquelle a été maintenue de tout temps par nos prédécesseurs, et que nous sommes aussi résolus de maintenir pour l'honneur de notre couronne et de la nation angloise."

*Wheaton's History*, p. 155-6.

(*j*) *Bynkershoek, de Dominio Maris*, cap. iii. pp. 365-6.



that Great Britain has ever again insisted upon any other limits to her or to other nations.

This right, however, was alluded to by Lord Stowell in his judgment in the *Maria* (k), a Swedish vessel sailing under convoy of an armed ship condemned for resisting the belligerents' visitation and search: "It might likewise" (he observes) "be improper for me to pass entirely without notice, as another preliminary observation (though without meaning to lay any particular stress upon it), that the transaction in question took place in the *British Channel* close upon the *British coast*, a station over which the Crown of England has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts."

(k) 1 *C. Rob. Adm. Rep.* p. 352.

## CHAPTER VII.

## NARROW SEAS—STRAITS.

CLXXXIX. WITH respect to Straits (*détroits de mer*, *Meerenge*, *freta*), where there is, as Grotius says in the passage already cited, *supra et infra fretum*, both the shores of which belong to one nation, these may be subject to the proprietary rights of that nation. Or if the shores belong to several nations, then, according to Puffendorf (*a*), the dominion is

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(*a*) Lib. iv. c. v. s. 7: "Aquandi ergo et lavandi usus nec magni est, nec nisi littorum accolis patet, et revera inexhaustus est. Inservit quoque aqua marina sali excoquendo; sed quo usu accolæ littorum duntaxat gaudent. Inexhaustum quoque et innoxie utilitatis est mare quantum ad navigationem. (Vid. l. xxiii. s. l. *D. de Servit. præd. rust.*) Verum sunt præter hos alii quoque usus maris, qui partim non penitus sunt inexhausti: partim populo maris accolæ occasionem damni præbere possunt, ut ex re ipsius non sit, omnes maris partes cuivis promiscue patere. Prioris generis est piscatio, et collectio rerum in mari nascentium. Piscatio etsi in mari fere sit uberior, quam in fluminibus aut lacubus: patet tamen ex parte eam exhauriri posse, et accolis maris maligniorem fieri, si omnes promiscue gentes propter littora alicujus regionis velint piscari; præsertim cum frequenter certum piscis, aut rei pretiosæ genus, puta, margaritæ, corallia, succinum, in uno tantum maris loco, eoque non valde spatiose inveniantur. Illic nihil obstat, quo minus felicitatem littoris aut vicini maris ipsorum accolæ potius, quam remotiores sibi propriam queant asserere; quibus cæteri non magis jure irasci aut invidere possunt, quam quod *non omnis fert omnia tellus; India mittit ebur, molles sua thura Sabæi*. Ex posteriori genere est, quod mare regionibus maritimis vicem munimenti præbet." And at the close of s. viii. he observes—"Ex hisce patet, hodie post rem navalem ad summum perductam fastigium, præsumi, quemvis populum maritimum, et cui ullus navigandi usus, esse dominum maris littoribus suis prætensi quousque illud munimenti rationem habere censetur: imprimis autem portuum, aut ubi alias commoda in terram excensio fieri potest. (*Bodinus de Rep.* l. i. c. ult. Baldi fide asserit: *jure quodammodo principum omnium maris accolarum communi receptum esse, ut sexaginta miliaribus a littore Princeps legem ad littus accedentibus*

distributed amongst them, upon the same principle as it would be among the several proprietors of the banks of a river: "*eorum imperia, pro latitudine terrarum, ad medium usque ejusdem pertinere intelligentur.*"

The exclusive right of the British Crown to the Bristol Channel, to the channel between Ireland and Great Britain (*Mare Hibernicum, Canal de Saint-George*), and to the channel between Scotland and Ireland, is uncontested. Pretty much in the same category were the three straits, forming the entrance to the Baltic, the Great and the Little Belt, and the Sound, so long as the two shores belonged to the Crown of Denmark (*b*); the straits of Messina (*il Faro di Messina, fretum Siculum*), once belonging to the Kingdom of the Two Sicilies: the straits leading to the Black Sea, the Dardanelles and Hellespont; the Thracian Bosphorus, belonging to the Turkish Empire (*c*). To narrow seas which flow between separate portions of the same kingdom, like the Danish and Turkish straits, or to other seas common to all nations, like

*dicere possit.*) Sinus quoque maris regulariter pertinere ad eum populum, cujus torris iste ambitur; neque minus freta. Quod si autem diversi populi fretum, aut sinum accolant, eorum imperia pro latitudine terrarum ad medium usque ejusdem pertinere intelligentur; nisi vel per conventionem indivisim id imperium contra externos exercere, ipsos autem promiscue inter se isto requore uti placuerit; vel alicui soli in totum istum sinum aut fretum sit dominium quæsitum ex pacto, reliquorum concessione tacita, jure victoriæ, aut quia is prior ad id mare sedes fixerat, idque statim totum occupaverat, et contra adversi littoris accolam actus imperii exercuerat. Quo casu tamen nihilominus reliqui sinus aut freti accolæ suorum quisque portuum, tractusque littoralis domini esse intelligentur."—*Puffendorf, de Jure Nat. et Gent.* l. iv. c. v. s. 8.

(*b*) *Schlegel, Staatsrecht Dänemarks*, p. 359. *Vide supra*, § clxxix.

(*c*) *Martens*, l. ii. c. i. s. 41, *Des Mers adjacentes*.

*Grotius*, l. ii. c. iii. s. 13, 2: "Videtur autem imperium in maris portionem eadem ratione acquiri qua imperia alia, id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur."

*Wheaton's Hist.* pp. 577, 583, 585, 587. The peculiar law and history of the Dardanelles and Bosphorus will be found discussed later in connection with the Black Sea, § cxxv.

the straits of Messina, and perhaps the St. George's Channel, the doctrine of *innocent use* is, according to Vattel, strictly applicable (*d*). How far this doctrine is sound to the extent to which it is carried by this jurist has been already considered in the matter of *Rivers*.

In 1602, Queen Elizabeth sent a special embassy to Denmark, having for its object the general adjustment of the relations between the two countries.

In the instructions given to the ambassadors, the principles of International Law, with respect to the subjects treated of in this chapter, are laid down with the perspicuity and precision which might be expected from the learning and ability, both of the monarch and her counsellors:—

“And you shall further declare that the Lawe of Nations  
 “alloweth of fishing in the sea everywhere; as also of using  
 “ports and coasts of princes in amitie for traffique and  
 “avoidinge danger of tempests; so that if our men be barred  
 “thereof, it should be by some contract. We acknowledge  
 “none of that nature; but rather, of conformity with the  
 “Lawe of Nations in these respects, as declaring the same  
 “for the removing of all clayme and doubt; so that it is

(*d*) Vattel, *des Détroits en particulier*, l. i. c. xxiii. s. 293: “Il faut remarquer en particulier, à l'égard des détroits, que quand ils servent à la communication de deux mers dont la navigation est commune à toutes les nations, ou à plusieurs, celle qui possède le détroit ne peut y refuser passage aux autres, pourvu que ce passage soit innocent et sans danger pour elle. En le refusant sans juste raison, elle priverait cette nation d'un avantage qui leur est accordé par la nature: et encore un coup, le droit d'un tel passage est un reste de la communion primitive. Seulement le soin de sa propre sûreté autorise le maître du détroit à user de certaines précautions, à exiger des formalités, établies d'ordinaire par la coutume des nations. Il est encore fondé à lever un droit modique sur les vaisseaux qui passent, soit pour l'incommodité qu'ils lui causent en l'obligeant d'être sur ses gardes, soit pour la sûreté qu'il leur procure en les protégeant contre leurs ennemis, en éloignant les pirates, et en se chargeant d'entretenir des fanaux, des balises et autres choses nécessaires au salut des navigateurs. C'est ainsi que le roi de Danemark exige un péage au détroit du *Sund*. Pareils droits doivent être fondés sur les mêmes raisons et soumis aux mêmes règles que les péages établis sur terre, ou sur une rivière.”

“ manifest, by denying of this Fishing, and much more, for  
 “ spoyling our subjects for this respect, we have been injured  
 “ against the Lawe of Nations, expressely declared by con-  
 “ tract, as in the aforesaid Treaties, and *the King's* own  
 “ letters of '85.

“ And for the asking of licence, if our predecessors  
 “ yelded thereunto, it was more than by Lawe of Nations  
 “ was due;—yelded, perhaps, upon some special consideration,  
 “ yet, growing out of use, it remained due by the Lawe of  
 “ Nations, what was otherwise due before all contract;  
 “ wherefore, by omitting licence, it cannot be concluded, in  
 “ any case, that the right of Fishing, due by the Lawe of  
 “ Nations, faileth; but rather, that the omitting to require  
 “ Licence might be contrarie to the contract, yf any such  
 “ had been in force.

“ Sometime, in speech, *Denmark* claymeth propertie in  
 “ that Sea, as lying between *Norway* and *Island*,—both  
 “ sides in the dominions of oure loving brother *the king*;  
 “ supposing thereby that for the propertie of a whole sea,  
 “ it is sufficient to have the banks on both sides, as in rivers.  
 “ Whereunto you may answeare, that though property of sea,  
 “ in some small distance from the coast, maie yeld some  
 “ oversight and jurisdiction, yet use not princes to forbid  
 “ passage or fishing, as is well seen in our Seas of England,  
 “ and Ireland, and in the Adriaticke Sea of the *Venetians*,  
 “ where we in ours, and they in theirs, have propertie of  
 “ command; and yet neither we in ours, nor they in theirs,  
 “ offer to forbid fishing, much lesse passage to ships of mer-  
 “ chandize; the which, by Lawe of Nations, cannot be  
 “ forbidden ordinarilie; neither is it to be allowed that  
 “ propertie of sea in whatsoever distance is consequent to  
 “ the banks, as it hapneth in small rivers. For then, by  
 “ like reason, the half of every sea should be appropriated to  
 “ the next bank, as it hapneth in small rivers, where the  
 “ banks are proper to divers men; whereby it would follow  
 “ that noe sea were common, the banks on every side being  
 “ in the propertie of one or other; wherfore there re-

“maineth no colour that *Denmarke* may claim any propertie  
 “in those seas, to forbid passage or fishing therein.

“You may therefore declare that we cannot, with our  
 “dignitie, yeld that our subjects be absolutelie forbidden  
 “those seas, ports, or coasts, for the use of fishing negotia-  
 “tion and safetie; neither did we ever yeld anie such right  
 “to *Spaine* and *Portugall*, for the *Indian* Seas or Havens;  
 “yet, yf our good brother *the king*, upon speciall reason,  
 “maie desire that we yeld to some renuinge of licence, or  
 “that some speciall place, upon some speciall occasion, be  
 “reserved to his particular use, in your discretion, for amitie  
 “sake, you may yeld thereunto; but then to define the  
 “manner of scking licence, in such sort as it be not preju-  
 “diciall to our subjects, nor to the effect of some sufficient  
 “fishing, and to be rather caried in the subject’s name, than  
 “in ours, or the king’s” (e).

CXC. The alliances contracted between the United Provinces of the Netherlands with the city of Lübeck in 1613, with Sweden in 1614 and 1640, and with the Hanseatic towns in 1615 and 1616, were all directed against the extraordinary pretensions of the Danish Crown.

But in more modern times these pretensions, though extravagant enough, have been limited to the right of excluding foreigners, not only from all commerce with Iceland and the Danish portion of Greenland, but from fishing within fifteen miles of the coast of Iceland.

The first ordinance of the kind was put forth by Denmark on April 16, 1636, and pointed at Great Britain; in 1682, it was renewed and confirmed; again on May 30, 1691; again on May 3, 1723; and again on April 1, 1776.

With respect to Greenland, the first prohibition to fish appears to have been issued on February 16, 1691. This was pointed against the Hanseatic towns. By a Treaty concluded on August 16, 1692, the city of Hamburg obtained the right of navigation and fishing in Davis’s Straits.

By Royal Edicts in 1751, in 1758, and in 1776, the commerce of *unprivileged* foreigners with Greenland was strictly forbidden.

CXCI. In these prohibitions there was no violation of the strict law, however they might offend the usual comity of nations. But the validity of the prohibition to fish within fifteen German miles of the shore of Greenland and Iceland was strictly denied by England and Holland, who adhered to the usual limit of cannon-shot from the shore.

CXCII. In the year 1740, a Danish man-of-war seized upon several Dutch vessels, alleged to be found navigating and fishing within the forbidden limits. They were taken to Copenhagen, tried and condemned in the Court of Admiralty of that capital. This act led to a vehement remonstrance on the part of the Dutch (*f*).

The States General, in a Resolution of April 17, 1741, laid down three distinct propositions, of which the substance was—

1. That the sea was free; and that it was competent to every one to fish in it in a proper manner, "*pourvu qu'il ne fasse pas d'une manière induc,*" which they maintained could not be predicated of fishing within four German miles of the coast, inasmuch as Denmark might make such a *Municipal* prohibition binding on her own subjects, but could not convert it into an *International* obligation.

2. That this right was fortified, in the case of Holland, by several Treaties with Denmark.

3. That they were in possession, and had long been so, of the right in question.

The Danish Government denied all these positions, with reference to the particular sea.

1. "Les rois de Danemark," they said, "Norvège, etc., ont joui depuis un temps immémorial des pleins effets d'une juste possession dans la mer du Nord" (*g*). That,

(*f*) *Martens, Causes célèbres*, t. i. p. 350.

(*g*) *Ibid.* t. i. p. 302.

possessing this "*domination juste et immémoriale*," they were, on the authority of Grotius, entitled to the exclusive fishery (*h*).

2. They went at length into the alleged Treaties, and drew from them a contrary inference.

3. They denied the possession of the right by the Dutch ; alleging that clandestine acts, punished as soon as discovered, could not be construed as possession, and that none others could be shown.

The dispute came to no legal termination. The crews of the seized ships were given up, but neither the ships nor their cargoes. In 1748 the Dutch sent ships of war to protect their merchantmen. Denmark threatened to make war, but did not.

CXCIII. In 1776 the strict provisions of the Danish Government for prohibiting all foreign nations from carrying on any commerce with Greenland gave rise to disputes between Denmark and Great Britain, and between Denmark and Holland, with respect to the seizure of an English brigantine and two Dutch vessels for alleged violation of these provisions, and their condemnation in the Danish Court of Admiralty. In both cases the vessels were, at the application of their respective Governments, restored ; but all claims for compensation by way of damage were steadily refused, as it was said that the vessels had been legally condemned by a proper tribunal (*i*). The Dutch on this occasion protested

(*h*) *Martens, Causes célèbres*, t. i. pp. 393-4.

(*i*) Extract from letter of Danish Government to the British Minister at Copenhagen :—

"Réponse du comte de Bernstorff à la note précédente, du 10 octobre 1776."—"On a l'honneur de répondre à la note remise par M. de Laval en date du 7 octobre 1776, que la demande du dédommagement du S. Kidder, menant le vaisseau le *Windsor*, pouvait avoir lieu, tant qu'il était douteux si sa saisie était légale, ou si elle ne l'était pas ; mais qu'elle n'est plus admissible selon la nature de la chose et les usages généralement reçus de toutes les puissances de l'Europe, dès qu'une sentence a été prononcée par un tribunal compétent à décider ce point, et dès qu'un vaisseau a été légalement condamné et déclaré confisqué avec sa cargaison. S. M. est sûre d'avoir donné la preuve la moins équivoque et



against the Danish pretensions with respect to Davis' Straits and the Greenland fisheries (j).

CXCIV. Great Britain has never been remiss in maintaining the rights of her fisheries. The Newfoundland fisheries were the subject of careful provisions in the Treaties of Utrecht and Paris, 1763 (k); and were in 1818 regulated by a Convention between Great Britain and the United States of North America (l).

CXCV. The language of the Article of the Convention was, that "whereas differences have arisen respecting the  
"liberty claimed by the United States, for the inhabitants  
"thereof to take, dry, and cure fish on certain coasts, bays,  
"harbours, and creeks of his Britannic Majesty's dominions  
"in America, it is agreed between the high contracting  
"parties, that the inhabitants of the said United States shall  
"have for ever, in common with the subjects of his Britannic

la moins ordinaire de son amitié pour S. M. Britannique, en arrêtant l'exécution et l'effet d'un arrêt donné en faveur de la compagnie de Groenland."—*Martens, Causes célèbres*, t. ii. pp. 131-2.

(j) Extract from the letter of the Dutch Minister at Copenhagen to Danish Government:—

"Mais comme véritablement cette affaire est d'une importance générale pour toutes les puissances intéressées dans la pêche de Groenland et du détroit de Davis, LL. IIII. PP. se verraient obligées d'en faire une cause commune avec ces puissances, et de défendre et protéger le droit indisputable de toutes les nations de pouvoir naviguer et pêcher librement par toutes les mers ouvertes, les détroits, et les bayes, et en particulier celui de leurs sujets, qui de temps immémorial ont été en possession d'user de ce droit sur les côtes de Groenland, dans le détroit de Davis, et nommément aussi dans la baye de Disco."—*Ibid.* pp. 139-40.

See, too, disputes between England, Denmark, and Holland, 1776; as to the Iceland fisheries, 1790, between Denmark and Holland, *ib.* t. i.; as to Finland, *Hefflers*, 140, n. 3; *Ortolan, Dipl. de la Mer*, i. 176; as to the Zuyder Zee, *The Twee Gebrueders*, 3 *C. Rob. Adm. Rep.* p. 339.

(k) *Koch, Hist. des Tr.* i. 200, 302.

*Art. 13 of the Treaty of Utrecht.*

*Art. 5 of the Treaty of Paris.*

(l) The line of demarcation between the rights of fishing of English and French subjects in the British Channel was elaborately defined by the Treaty of August 2, 1839.—*De Martens et de C.* iv. 601.

*De Martens et de C.* iii. 391.

"Majesty, the liberty to take fish of every kind on that part  
 "of the southern coast of Newfoundland which extends from  
 "Cape Ray to the Ramean Islands, on the western and  
 "northern coasts of the said Newfoundland, from the said  
 "Cape Ray to the Quirpon Islands, on the shores of the  
 "Magdalen Islands, and also on the coasts, bays, harbours,  
 "and creeks, from Mount Joly, on the southern coast of the  
 "Labrador, to and through the Straits of Belle Isle, and  
 "thence northwardly indefinitely along the coast, without  
 "prejudice, however, to any of the exclusive rights of the  
 "Hudson's Bay Company; and that the American fishermen  
 "shall also have liberty for ever to dry and cure fish in any  
 "of the unsettled bays, harbours, and creeks of the southern  
 "part of the coast of Newfoundland, here above described,  
 "and off the coast of Labrador; but so soon as the same, or  
 "any portion thereof, shall be settled, it shall not be lawful  
 "for the said fishermen to dry or cure fish at such portion  
 "so settled, without previous agreement for such purpose  
 "with the inhabitants, proprietors, or possessors of the  
 "ground.

"And the United States hereby renounce for ever any  
 "liberty heretofore enjoyed or claimed by the inhabitants  
 "thereof to take, dry, or cure fish on or within three marine  
 "miles of any of the coasts, bays, creeks, or harbours of his  
 "Britannic Majesty's dominions in America not included  
 "within the above-mentioned limits. Provided, however,  
 "that the American fishermen shall be admitted to enter  
 "such bays or harbours for the purpose of shelter and of  
 "repairing damages therein, of purchasing wood, and of  
 "obtaining water, and for no other purpose whatever. But  
 "they shall be under such restrictions as may be necessary  
 "to prevent their taking, drying, or curing fish therein, or in  
 "any other manner whatever abusing the privileges hereby  
 "reserved them" (m).

CXCVI. It appears that these provisions had not been

strictly observed by the subjects of the United States, and that in 1849 complaints were made by the Legislature of Nova Scotia to the British Crown, who took the opinion of the Law officers as to the true construction of the Article. This opinion was, that, "by the terms of the convention, "American citizens were excluded from any right of fishing "within three miles from the coast of British America, and "that the prescribed distance of three miles is to be measured "from the headlands, or extreme points of land, next the "sea or the coast, or of the entrance of bays or indents of the "coast, and that consequently no right exists on the part of "American citizens to enter the bays of Nova Scotia, there "to take fish, although the fishing, being within the bay, "may be at a greater distance than three miles from the "shore of the bay, as we are of opinion that the term 'head- "land' (*n*) is used in the Treaty to express the part of the "land we have before mentioned, including the interior of "the bays and the indents of the coasts" (*o*).

The neglect of these provisions by the subjects of the United States still continued, and in 1852 British men-of-war were sent to protect the fisheries and seize the boats which violated the Treaty. This act of the British Government created a great excitement in the United States, though it does not appear that the legality of the construction of the Article was impugned; but Mr. Webster insisted on the inconvenience to the subjects of the United States, and on the want of *comity* shown in its sudden enforcement after many years (*p*) of an opposite practice (*q*). A temporary adjustment was effected by a Treaty of June 5, 1854—the

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(*n*) The term "*headland*," however, does *not* occur in the Treaty. The Law officers probably gave their opinion on a statement of the Colonists in which the word did occur. My attention was drawn to this strange fact by Mr. Addison Thomas in 1854, after the publication of the first edition of this work.

(*o*) *Annual Reg.* vol. xciv. (1852), pp. 296-7. See, too, President Fillmore's Annual Message, 299.

(*p*) Twenty-five it is said by President Fillmore.

(*q*) *Annual Reg.* for 1852, vol. xciv. pp. 295-300.

Reciprocity Treaty already mentioned. It gave to citizens of the United States, in addition to their rights under the Treaty of 1818, the right to take fish, except shellfish, "on the sea coasts and shores, and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore," with permission to land for the purpose of drying nets and curing fish. Corresponding rights were given to British subjects to take sea fish and to land and dry nets on the coast of the United States north of latitude 36 deg. N. The Treaty did not embrace the salmon and shad fisheries, or the fisheries at the mouths of rivers. But we have already observed that the United States, using the power given them by the Treaty, put an end to it in 1865 (r).

One of the provisions of the Treaty of Washington of May 1871 established a tribunal of Arbitrators to award upon the claim of Canada to compensation in respect of her fisheries from the United States (s). The Halifax Fishery Commissioners awarded to Canada as a compensation five and a half millions of dollars. The American Commissioner, however, dissented from the award, and his dissent was the more important, because there was no special provision, as there was with regard to the Geneva arbitration, that the award of the majority should suffice. It was at one time uncertain what the United States would do in consequence of this omission: but in 1878 Congress passed a law providing for the payment of the indemnity.

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(r) See *Dana's Wheaton*, n. 110, p. 206; *Lawrence's Wheaton*. The *Revue des Deux Mondes*, tom. xvi., Nov. 1874, contains an able article on *Les Pêcheries de Terre Neuve et les Traites*.

(s) See *Papers relating to the Treaty of Washington*, published by the American Government. Washington 1872. 5 vols.

## CHAPTER VIII.

## PORTIONS OF THE SEA.

CXCVII. THOUGH the open sea be thus incapable of being subject to the rights of property, or jurisdiction, yet reason, practice, and authority have firmly settled that a different rule is applicable to *certain portions* of the sea (*a*).

CXCVIII. And first with respect to that portion of the sea which washes the coast of an independent State. Various claims have been made, and various opinions pronounced, at different epochs of history, as to the extent to which territorial property and jurisdiction may be extended. But the rule of law may be now considered as fairly established—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a Treaty (*b*) or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon-shot, from the shore at low tide:—"quousque e terra imperari potest,"—"quousque tormenta exploduntur,"—"terræ dominium finitur ubi finitur armorum vis,"—is the language of Bynkershoek (*c*). "In the sea, out of the reach of cannon-shot" (says Lord Stowell), "universal use is presumed." This is the limit

(*a*) *Günther*, t. ii. s. xxviii. p. 48: "Eigenthum und Herrschaft des Meeres an den Küsten."

*Heffters*, 1. Buch, s. lxxvi. p. 141: "Schutzrechte über die Küstengewässer."

*Ortolan*, *Dipl. de la Mer*, t. i. l. ii. c. viii.: "Mer territoriale."

*Kent's Commentaries*, vol. i. s. xxvi. p. 25.

(*b*) *Valin*, *Ordonnance de la Marine*, l. v. tit. i. p. 687: "De la Liberté de la Pêche," contains a full dissertation on this subject.

*Klüber*, s. 180, n. a.

(*c*) *Quæstiones Juris Publici*, cap. viii.

fixed to absolute property and jurisdiction; but the rights of independence (d) and self-preservation in times of peace have been judicially considered to justify a nation in preventing her revenue laws from being evaded by foreigners beyond this exact limit; and both Great Britain and the United States of North America have provided by their municipal law against frauds being practised on their revenues, by prohibiting foreign goods to be transhipped within the distance of four leagues of the coast, and have exercised a jurisdiction for this purpose in time of peace. These were called the *Hovering Acts* (e).

(d) *The Louis*, 2 *Dodson Adm. Rep.* p. 245.

*The Twee Gebrœders*, 3 *C. Rob. Adm. Rep.* p. 339.

*Jacobsen, Seerrecht*, pp. 586-590.

"Si quelque vaisseau de l'une ou de l'autre partie est en engagement avec un vaisseau appartenant à quelqu'une des puissances chrétiennes, à la portée du canon des châteaux de l'autre, le vaisseau qui se trouvera ainsi en action sera défendu et protégé autant que possible, jusqu'à ce qu'il soit en sûreté."—*Etats-Unis et Maroc* (1787), Art. 10.—*De Martens et de Cussy, Rec. de Traités, etc.* vol. i. p. 380.

"En conséquence de ces principes, les hautes parties contractantes s'engagent réciproquement, en cas que l'une d'entre elles fût en guerre contre quelque puissance que ce soit, de n'attaquer jamais les vaisseaux de ses ennemis que hors de la portée du canon des côtes de son allié."—*France et Russie*, Art. 27, *ibid.* p. 395. (This treaty was only entered into for twelve years.)

"Aucune des deux parties ne souffrira que le vaisseau ou effets appartenant aux sujets ou citoyens de l'autre, soient pris à une portée de canon de la côte, ni dans aucune des baies, rivières, ou ports de leurs territoires, par des vaisseaux de guerre ou autres, ayant lettres de marque de prince, république ou État, quels qu'ils puissent être. Mais dans le cas où cela arriverait, la partie dont les droits territoriaux auraient été ainsi violés, fera tous les efforts dont elle est capable pour obtenir de l'offenseur pleine et entière satisfaction pour le vaisseau ou les vaisseaux ainsi pris, soit que ce soient des vaisseaux de guerre ou des navires marchands."—*Etats-Unis d'Amérique et Grande-Bretagne*, Art. 25.—*De Martens et de Cussy, Rec. de Traités*, vol. ii. p. 92.

(e) 9 Geo. III. c. 35, prohibited foreign goods from being transhipped within four leagues of the coast without payment of duties. The American Act of Congress, 1799, March 2, ss. 25, 26, 27, 99, contains the same prohibition, and their Supreme Court has declared this regulation to be founded upon International Law.—*Church v. Hubbards*, 2 *Cranch Reports*, p. 187.—*The Louis*, 2 *Dodson Adm. Rep.* 245-6. This

Nevertheless, it cannot be maintained as a sound proposition of International Law that a seizure for purposes of enforcing municipal law can be lawfully made beyond the limits of the territorial waters, though in these *hovering* cases judgments have been given in favour of seizures made within a limit fixed by municipal law, but exceeding that which has been agreed upon by International Law. Such a judgment, however, could not have been sustained if the Foreign State whose subject's property had been seized had thought proper to interfere. Unless, indeed, perhaps, in a particular case, where a State had put in force, or at least enacted, a municipal law of its own, like that of the Foreign State under which its subject's property had been seized. It is at least quite intelligible why such a State would not interfere on behalf of its subject. My observation does not deny to the neutral, in time of war, the right to complain of and possibly to prevent the *hovering* of belligerent ships so near her coasts and ports as manifestly to menace and alarm vessels homeward or outward bound. This is a question which will receive further consideration when the relations of States in time of war come under discussion. The limit of territorial waters has been fixed at a marine league, because that was supposed to be the utmost distance to which a cannon-shot from the shore could reach. The great improvements recently effected in artillery seem to make it desirable that this distance should be increased, but it must be so by the general consent of nations, or by specific treaty with particular States (*f*).

CXCVIII. In the year 1860 an English ship ran down

case will not be found on examination to support the lawfulness of a seizure beyond the marine league, though often cited for this purpose.—*Waite's American State Papers*, 1-75.

*Vide post*, s. cc. as to the *King's Chambers*. The present English law on the subject is contained in the Customs Consolidation Act, 1876, 39 and 40 Vict. c. 36, ss. 53, 134, 138, 147, 179, 181, 182, 189, 229.

(*f*) *Hudson v. Guestier*, 4 *Cranch*, 203, and 6 *Cranch*, 281. Not easily reconcilable with *Rose v. Himely*, 4 *Cranch*, 241. *Dani's Wheaton*, p. 180, n. 108.

a foreign ship within three miles of the English coast; the owners of the foreign ship brought a suit, and obtained judgment against the English vessel, the owners of which then filed their bill to obtain the benefit of the limitation of liability prescribed by the Merchant Shipping Act, 1854. It was decided by Vice-Chancellor Page Wood, after a very able and learned argument, that these provisions applied (g).

CXCVIII.B. In the recent case (1876 A.D.) of Regina v. Keyn (h), the prisoner was a foreigner in command of a foreign ship on a voyage from one foreign port to another. Whilst passing within three miles of the English coast his ship ran into a British ship and sank her. A passenger on board the British ship was drowned, and the prisoner, having been indicted at the Central Criminal Court, was found guilty of manslaughter. The question whether that court had jurisdiction was reserved for the Court for Crown Cases Reserved. After the case had been twice argued, it was holden by a majority of one (i), that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged. The whole of the majority rested their decision on the ground that prior to 28 Hen. VIII. c. 15, the Admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the English coast; that that statute and the subsequent ones only transferred to the common law courts and the Central Criminal Court the jurisdiction

(g) *The General Iron Screw Collier Co. v. Schurmans*, 1 *Johnson and Hemming Rep.* p. 180. These sections have been superseded by other provisions in the Merchant Shipping Act Amendment Act, 1862.

(h) *Law Reports*, 2 *Ex. Div.* p. 63.

(i) The majority consisted of Cockburn, C.J., Kelly, C.B., Bramwell, J.A., Lush and Field, JJ., Sir R. Phillimore and Pollock, B.; the dissentients were Lord Coleridge, C.J., Brett and Amphlett, JJ.A., Grove, Denman, and Lindley, JJ. Archibald, J., agreed with the majority, but died before the judgment was delivered.

See, for a comment upon this judgment, p. 21 of the Argument of Mr. R. H. Dana on behalf of the United States before the Halifax Fishery Commissioners (*infra*, p. 287). In this argument the reasoning of the majority is approved and adopted.



formerly possessed by the Admiral; and that, therefore, in the absence of statutory enactment, the Central Criminal Court had no power to try such an offence.

Sir F. Kelly and the author of these Commentaries relied also on the ground that, by the principles of International Law, the power of a nation over the sea within three miles of its coasts is only for certain limited purposes; and that Parliament could not consistently with those principles apply English criminal law within those limits.

The writer of these pages summed up in his judgment the conclusions which appeared to him to result from the various authorities referred to, as follows (*j*):—

“ The consensus of civilised independent States has recognized a maritime extension of frontier to the distance of three miles from low-water mark, because such a frontier or belt of water is necessary for the defence and security of the adjacent State.

“ It is for the attainment of these particular objects that a *dominium* has been granted over this portion of the high seas.

“ This proposition is materially different from the proposition contended for, namely, that it is competent to a State to exercise within these waters the same rights of jurisdiction and property which appertain to it in respect to its lands and its ports. There is one obvious test by which the two sovereignties may be distinguished.

“ According to modern International Law, it is certainly a right incident to each State to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas.

“ In the former case there is no *jus transitus*; in the latter case there is.

“ The reason of the thing, that is, the defence and security of the State, does not require or warrant the exclusion of

“peaceable foreign vessels from passing over these waters,  
 “and the custom and usage of nations have not sanc-  
 “tioned it.

“Consequences fraught with mischief and injustice might  
 “flow from the opposite doctrine, which would render ap-  
 “plicable to a foreign vessel while *in itinere* from one port  
 “to another, passing over these waters, all the criminal law  
 “of the adjacent territory. No single instance has been  
 “brought to our notice of the practical exercise by any  
 “nation of this jurisdiction.

“The authorities cited in order to show that a foreign  
 “vessel is subject to the laws of the foreign port which she  
 “enters appear to me inapplicable to the present case.

“A foreign merchant vessel going into the port of a foreign  
 “State subjects herself to the ordinary law of the place  
 “during the period of her commorancy there ; she is as much  
 “a *subditus temporaneus* as the individual who visits the in-  
 “terior of the country for the purposes of pleasure or busi-  
 “ness.

“It may be that the foreign State, influenced by con-  
 “siderations of public policy or by treaty obligations, chooses  
 “to forego the exercise of her law over the foreign vessel and  
 “crew, or exercises it only when they disturb the peace and  
 “good order of the port. This is the course which France  
 “has usually pursued ; an illustration of it is furnished by  
 “the case cited from Dalloz (*Juris. Gén.* 1859, ‘Cour de  
 “Cassation,’ pp. 88, 89), the result of which is correctly stated  
 “in the marginal note :—

“ ‘ Les bâtimens de commerce étrangers, stationnant dans  
 “un port français, sont soumis à la juridiction territoriale pour  
 “ce qui concerne les délits entre étrangers et notamment  
 “entre gens de l’équipage, dont la répression n’intéresse pas  
 “exclusivement la discipline et l’administration intérieure du  
 “bord.—(*C. Nap.* 3 ; *Av. Cons. d’Et.* 20, Nov. 1806.)

“ ‘ Il en est ainsi, surtout, lorsque ces délits sont de nature  
 “à compromettre la tranquillité du port, ou lorsque l’inter-  
 “vention de l’autorité locale a été réclamée.’

“I cannot entertain any doubt that in this country a  
“foreign sailor, complaining of the ill-treatment of his  
“master on board a foreign ship in an English port, would  
“be entitled to the protection of an English court of justice.

“If, indeed, as has been contended, there be no difference  
“between the jurisdiction by the adjacent State over vessels  
“in ports and over passing and commorant vessels, then the  
“whole criminal law of England was applicable to the crew  
“and those on board the German vessel, so long as she was  
“within a marine league of the English shore.

“The consequences of such a position of law appear to  
“me, especially in the absence of any precedent, sufficient  
“to render it untenable.”

CXCVIIIc. In consequence of the decision in this case, an Act was passed in the session of 1878 (*k*), which, after a preamble reciting that “the rightful jurisdiction of  
“her Majesty, her heirs and successors extends and has  
“always extended over the open seas adjacent to the coasts  
“of the United Kingdom, and of all other parts of her  
“Majesty’s dominions to such a distance as is necessary for  
“the defence and security of such dominions,” and that “it is  
“expedient that all offences committed in the open sea within  
“a certain distance of the coasts of the United Kingdom  
“and of all other parts of her Majesty’s dominions, by  
“whomsoever committed, should be dealt with according to  
“law,” proceeds to enact as follows:—

“1. This Act may be cited as the Territorial Waters  
“Jurisdiction Act, 1878.

“2. An offence committed by a person, whether he is or  
“is not a subject of her Majesty, on the open sea within  
“the territorial waters of her Majesty’s dominions, is an  
“offence within the jurisdiction of the Admiral, although it  
“may have been committed on board or by means of a  
“foreign ship, and the person who committed such offence  
“may be arrested, tried, and punished accordingly.

“ 3. Proceedings for the trial and punishment of a person  
“ who is not a subject of her Majesty, and who is charged  
“ with any such offence as is declared by this Act to be  
“ within the jurisdiction of the Admiral, shall not be in-  
“ stituted in any court of the United Kingdom, except with  
“ the consent of one of her Majesty’s Principal Secre-  
“ taries of State, and on his certificate that the institution  
“ of such proceedings is in his opinion expedient, and shall  
“ not be instituted in any of the dominions of her Majesty  
“ out of the United Kingdom, except with the leave of the  
“ governor of the part of the dominions in which such pro-  
“ ceedings are proposed to be instituted, and on his certifi-  
“ cate that it is expedient that such proceedings should be  
“ instituted.

“ 4. On the trial of any person who is not a subject or  
“ her Majesty for an offence declared by this Act to be  
“ within the jurisdiction of the Admiral, it shall not be neces-  
“ sary to aver in any indictment or information on such  
“ trial that such consent or certificate of the Secretary of  
“ State or Governor as is required by this Act has been given,  
“ and the fact of the same having been given shall be pre-  
“ sumed, unless disputed by the defendant at the trial; and  
“ the production of a document purporting to be signed by  
“ one of her Majesty’s Principal Secretaries of State as  
“ respects the United Kingdom, and by the Governor as  
“ respects any other part of her Majesty’s dominions, and  
“ containing such consent and certificate, shall be sufficient  
“ evidence for all the purposes of this Act of the consent and  
“ certificate required by this Act.

“ Proceedings before a justice of the peace or other magis-  
“ trate previous to the committal of an offender for trial or  
“ to the determination of the justice or magistrate that the  
“ offender is to be put upon his trial shall not be deemed  
“ proceedings for the trial of the offence committed by such  
“ offender for the purposes of the said consent and certificate  
“ under this Act.

“ 5. Nothing in this Act contained shall be construed to be

“ in derogation of any rightful jurisdiction of her Majesty,  
“ her heirs or successors, under the law of nations, or to  
“ affect or prejudice any jurisdiction conferred by Act of  
“ Parliament or now by law existing in relation to foreign  
“ ships or in relation to persons on board such ships.

“ 6. This Act shall not prejudice or affect the trial in  
“ manner heretofore in use of any act of piracy as defined  
“ by the law of nations, or affect or prejudice any law relating  
“ thereto ; and where any act of piracy as defined by the law  
“ of nations is also any such offence as is declared by this Act  
“ to be within the jurisdiction of the Admiral, such offence  
“ may be tried in pursuance of this Act, or in pursuance  
“ of any other Act of Parliament, law, or custom relating  
“ thereto.

“ In this Act, unless there is something inconsistent in  
“ the context, the following expressions shall respectively  
“ have the meanings herein-after assigned to them ; that is  
“ to say—

“ ‘ The jurisdiction of the Admiral,’ as used in this Act,  
“ includes the jurisdiction of the Admiralty of England and  
“ Ireland, or either of such jurisdictions as used in any Act  
“ of Parliament ; and for the purpose of arresting any per-  
“ son charged with an offence declared by this Act to be  
“ within the jurisdiction of the Admiral, the territorial  
“ waters adjacent to the United Kingdom, or any other  
“ part of her Majesty’s dominions, shall be deemed to be  
“ within the jurisdiction of any judge, magistrate, or officer  
“ having power within such United Kingdom, or other part  
“ of her Majesty’s dominions, to issue warrants for arresting  
“ or to arrest persons charged with offences committed within  
“ the jurisdiction of such judge, magistrate, or officer.

“ ‘ United Kingdom ’ includes the Isle of Man, the Channel  
“ Islands, and other adjacent islands.

“ ‘ The territorial waters of her Majesty’s dominions,’ in  
“ reference to the sea, means such part of the sea adjacent  
“ to the coast of the United Kingdom, or the coast of some  
“ other part of her Majesty’s dominions, as is deemed by

“international law to be within the territorial sovereignty  
 “of her Majesty; and for the purpose of any offence de-  
 “clared by this Act to be within the jurisdiction of the  
 “Admiral, any part of the open sea within one marine  
 “league of the coast measured from low-water mark shall  
 “be deemed to be open sea within the territorial waters of  
 “her Majesty’s dominions.

“‘Governor,’ as respects India, means the Governor-  
 “General or the Governor of any Presidency; and where a  
 “British possession consists of several constituent colonies,  
 “means the Governor-General of the whole possession or  
 “the Governor of any of the constituent colonies; and as  
 “respects any other British possession, means the officer  
 “for the time being administering the government of such  
 “possession; also any person acting for or in the capacity  
 “of Governor shall be included under the term ‘Governor:’

“‘Offence’ as used in this Act means an act, neglect, or  
 “default of such a description as would, if committed within  
 “the body of a county in England, be punishable on indict-  
 “ment according to the law of England for the time being  
 “in force.

“‘Ship’ includes every description of ship, boat, or other  
 “floating craft. “‘Foreign ship’ means any ship which  
 “is not a British ship.”

It is hardly necessary to state that this Statute does not affect the general International Law on the subject.

CXCIX. The rule of the marine league being the boundary of the territorial jurisdiction is liable to be affected by Treaty. The Emperor of China has conceded jurisdiction to the Crown of England over British subjects in China; and the Crown, by an Order in Council assented to by the Chinese Government, has jurisdiction over British subjects “being within the dominions of the Emperor of China, “or being within any ship or vessel at a distance of not “more than *one hundred* miles from the coast of China” (1).

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(1) Papers presented to both Houses of Parliament by command of her Majesty, 1853. *Vide* 41 & 42 Vict. c. 67, § 6; *et post*, ch. xix.

CC. Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may, under special circumstances, be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries which are enclosed, but not entirely surrounded by lands belonging to one and the same State. With respect to bays and gulfs so enclosed, there seems to be no reason or authority for a limitation suggested by Martens (*m*), “surtout en tant que ceux-ci ne passent pas la largeur ordinaire des rivières, ou la double portée du canon,”—or for the limitation of Grotius (*n*) which is of the vaguest character,—“mare occupari potuisse ab eo qui terras ad latus utrumque possideat, etiamsi aut supra pateat ut sinus, aut supra et infra ut fretum, dummodo non ita magna sit pars maris ut non cum terris comparata portio earum videri possit.” The real question, as Günther truly remarks, is, whether it be within the physical competence of the nation, possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded: or, as Martens declares in his earliest, and in some respects best, treatise on International Law, “Partes maris territorio ita natura vel arte inclusæ ut *exteri aditu impediri possint*, gentis ejus sunt, cujus est territorium circumjacens” (*o*). To the same effect is the language of Vattel: “Tout ce que nous avons dit des parties de la mer voisines des côtes, se dit plus particulièrement et à plus forte raison des rades, des baies et des détroits, comme plus capables encore d’être occupés, et plus importants à la sûreté du pays. Mais je parle des baies et détroits de peu d’étendue, et non de ces grands espaces de mer auxquels on donne quelquefois ces noms, tels que la baie de *Hudson*, le détroit de *Magellan*, sur lesquels l’empire ne saurait s’étendre, et moins encore la propriété. Une baie dont on peut défendre

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(*m*) Lib. ii. c. i. s. 40.

(*n*) Lib. ii. c. iii. s. 8.

(*o*) *Præcæ Lineæ Juris Gentium*, l. iv. c. iv. s. 110.

“ l'entrée, peut être occupée et soumise aux lois du souverain ;  
 “ il importe qu'elle le soit, puisque le pays pourrait être  
 “ beaucoup plus aisément insulté en cet endroit que sur des  
 “ côtes ouvertes aux vents et à l'impétuosité des flots ” ( *p* ).

Thus Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of sea cut off by lines drawn from one promontory to another, and called *the King's Chambers*. And there is the high authority of Sir Leoline Jenkins (*q*), that vessels, even of the enemies of Great Britain, captured by foreign cruisers within these *Chambers*, would be restored by the High Court of Admiralty. In time of war (*r*), at least, the Solent, or the portion of the sea which flows between the Isle of Wight and the mainland, might, I think, be justly asserted to belong as completely as the soil of the adjacent shores to Great Britain.

(*p*) *Vattel, Le Droit, etc.* t. i. l. i. c. xxiii. s. 291.

(*q*) *Life of Sir Leoline Jenkins*, vol. ii. pp. 727, 732, 755, 780. As to King's Chambers, see Selden, *Mare Clausum*, ch. 22, in which is a list of those Chambers as given by *James the First*, 1604.

(*r*) I do not think that the judgment of the Privy Council (1864) in the case of *The Eclipse*, 15 *Moore's P. C. Rep.* p. 267, affects this proposition, but I think it right to cite the passage. (The question in the case was whether a collision between a British and foreign vessel in the Solent should be tried by the ordinary Maritime Law or by 17 and 18 Vict. c. 104.) Their Lordships say: “ In our opinion, the statute cannot be considered to have any local application to the Solent, and to affect foreign as well as British vessels navigating within the limits of that channel; and that, even if the statute were binding on all vessels navigating within a tidal river, which, however, the case of the *Eyenoord* (*Swab.* 374) discountenances, we think that it could not be locally binding within the water of the Isle of Wight and the mainland, and that the circumstance that the Isle of Wight is by local and territorial designation to be deemed a portion of the county of Southampton does in any degree affect this question. We are of opinion that this collision must be considered to have taken place on the high seas, in a place where a foreign vessel has a right of sailing without being bound by any of the provisions of the statutes enacted to govern British ships. This being so, it follows that the Merchant Shipping Act has no application to this case, as it has been fully determined that where a British and a foreign ship meet on the high seas the statute is not binding on either. The principle, therefore, by which this case must be decided must be found in the ordinary rules of the sea.”



CCI. Mr. Chancellor Kent states the claims of the United States upon this matter in the following language:—

“ Considering the great extent of the line of the American  
“ coasts, we have a right to claim, for fiscal and defensive  
“ regulations, a liberal extension of maritime jurisdiction:  
“ and it would not be unreasonable, as I apprehend, to as-  
“ sume, for domestic purposes connected with our safety and  
“ welfare, the control of the waters on our coasts, though  
“ included within lines stretching from quite distant head-  
“ lands, as, for instance, from Cape Ann to Cape Cod, and  
“ from Nantucket to Montauk Point, and from that point  
“ to the Capes of the Delaware, and from the South Cape of  
“ Florida to the Mississippi. It is certain that our Govern-  
“ ment would be disposed to view with some uneasiness and  
“ sensibility, in the case of war between other maritime  
“ powers, the use of the waters of our coast, far beyond the  
“ reach of cannon-shot, as cruising ground for belligerent  
“ purposes. In 1793 our Government thought they were  
“ entitled, in reason, to as broad a margin of protected navi-  
“ gation as any nation whatever, though at that time they  
“ did not positively insist beyond the distance of a marine  
“ league from the seashores; and in 1806 our Government  
“ thought it would not be unreasonable, considering the  
“ extent of the United States, the shoalness of their coast,  
“ and the natural indication furnished by the well-defined  
“ path of the Gulf Stream, to expect an immunity from  
“ belligerent warfare, for the space between the limit and the  
“ American shore. It ought, at least, to be insisted, that the  
“ extent of the neutral immunity should correspond with  
“ the claims maintained by Great Britain around her own  
“ territory, and that no belligerent right should be exercised  
“ within ‘ the chambers formed by headlands, or anywhere  
“ at sea within the distance of four leagues, or from a right  
“ line from one headland to another.’ In the case of the  
“ *Little Belt*, which was cruising many miles from the shore  
“ between Cape Henry and Cape Hatteras, our Government  
“ laid stress on the circumstance that she was ‘ hovering on

“our coasts;’ and it was contended on the part of the United States, that they had a right to know the national character of armed ships in such a situation, and that it was a right immediately connected with our tranquillity and peace. It was further observed, that all nations exercised the right, and none with more rigour, or at a greater distance from the coast, than Great Britain, and none on more justifiable grounds than the United States. There can be but little doubt that, as the United States advance in commerce and naval strength, our Government will be disposed more and more to feel and acknowledge the justice and policy of the British claim to supremacy over the narrow seas adjacent to the British Isles, because we shall stand in need of similar accommodation and means of security” (s).

CCIA. Mr. Dana, in a very elaborate and able argument addressed, November 1877, to the Halifax Fishery Commissioners appointed under the Treaty of Washington (t), said:—“As to the nature of this right which England claimed in 1818 to exclude us from the three miles by virtue of some supposed principle of International Law, I have stated (u) my opinion upon it; but your Honours will be pleased to observe that on that, as on the subject of headlands, an essential part of it, without which it can never be put in execution, there is no fixed international law. I have taken pains to study the subject, have examined it carefully since I came here, and I think I have examined most of the authorities. I do not find one who pledges himself to the three-mile line. It is always ‘three miles’ or ‘the cannon-shot.’ Now, the cannon-shot is the more scientific mode of propounding the question, because that was the length of the arm of the nation bordering upon the sea, and she could exercise her rights so far as the length of her arm could be extended. That was the cannon-shot, and that, at that time, was about three

(s) *Commentaries*, vol. i. pp. 29, 30.

(t) *Vide supra*, p. 273.

(u) *Argument of Richard H. Dana, Jr., on behalf of the United States*, November 1877, pp. 18-20.

“miles. It is now many more miles. We soon began to  
“find out that it would not do to rest it upon the cannon-  
“shot. It is best to have something certain. But inter-  
“national writers have arrived at no further stage than this:  
“to say that it is ‘three miles *or* the cannon-shot.’ And  
“upon the question, ‘How is the three-mile line to be  
“determined?’ we find everything utterly afloat and un-  
“decided. My purpose in making these remarks is, in  
“part, to show your Honours what a precarious position a  
“State holds which undertakes to set up this right of ex-  
“clusion, and to put it in execution. The international  
“law makes no attempt to define what is ‘coast.’ We know  
“well enough what a straight coast is and what a curved  
“coast is; but the moment the jurist comes to bays, har-  
“bours, gulfs, and seas, they are utterly afloat—as much so  
“as the seaweed that is swimming up and down the channels.  
“They make no attempt to define it, either by distance, or  
“by political or natural geography. They say at once: ‘It  
“is difficult where there are seas and bays.’ Names will  
“not help us. The Bay of Bengal is not national property:  
“it is not the King’s Chamber; nor is the Bay of Biscay,  
“nor the Gulf of St. Lawrence, nor the Gulf of Mexico.  
“An inlet of the sea may be called a ‘bay,’ and it may be two  
“miles wide at its entrance, or it may be called a bay, and it  
“may take a month’s passage in an old-fashioned sailing-vessel  
“to sail from one headland to the other. What is to be  
“done about it? If there is to be a three-mile line from  
“the coast, the natural result is, that that three-mile line  
“should follow the bays. The result then would be, that a  
“bay more than six miles wide was an international bay;  
“while one six miles wide or less would be a territorial bay.  
“That is the natural result. Well, nations do not seem to  
“have been contented with this. France has made a  
“treaty with England saying that, as between them, any-  
“thing less than ten miles wide shall be a territorial bay.

“The difficulties on that subject are inherent, and, to my  
“mind, they are insuperable. England claimed to exclude

“us from fishing in the Bay of Fundy ; and it was left to  
 “referees, of whom Mr. Joshua Bates was umpire, and they  
 “decided that the Bay of Fundy was not a territorial bay  
 “of Great Britain, but a part of the high seas. This  
 “decision was put partly upon its width, but the real ground  
 “was that one of the assumed headlands belonged to the  
 “United States, and it was necessary to pass the head-  
 “land in order to get to one of the ports of the United  
 “States. For these special reasons the Bay of Fundy,  
 “whatever its width, was held to be a public and inter-  
 “national bay.”

This nice question as to jurisdiction over bays came before the Judicial Committee of the Privy Council in A.D. 1877. Lord Blackburn delivered the judgment. He said :—“Passing from the common law of England to the  
 “general law of nations, as indicated by the text writers  
 “on international jurisprudence, we find an universal agree-  
 “ment that harbours, estuaries, and bays landlocked belong  
 “to the territory of the nation which possesses the shores  
 “round them, but no agreement as to what is the rule to  
 “determine what is ‘bay’ for this purpose.

“It seems generally agreed that where the configuration  
 “and dimensions of the bay are such as to show that the  
 “nation occupying the adjoining coasts also occupies the  
 “bay, it is part of the territory ; and, with this idea, most of  
 “the writers on the subject refer to defensibility from the  
 “shore as the test of occupation : some suggesting, therefore,  
 “a width of one cannon-shot from shore to shore, or three  
 “miles ; some, a cannon-shot from each shore, or six miles ;  
 “some, an arbitrary distance of ten miles. All of these are  
 “rules which, if adopted, would exclude *Conception Bay*  
 “from the territory of *Newfoundland* ; but also would have  
 “excluded from the territory of *Great Britain* that part of  
 “the Bristol Channel which in *Reg. v. Cunningham* (x) was  
 “decided to be in the county of *Glamorgan*. On the other

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(x) *Bell's Crown Cases*, p. 72.

“hand, the diplomatists of the United States in 1793  
 “claimed a territorial jurisdiction over much more exten-  
 “sive bays, and Chancellor Kent, in his Commentaries,  
 “though by no means giving the weight of his authority to  
 “this claim, gives some reason for not considering it alto-  
 “gether unreasonable.

“It does not appear to their Lordships that jurists and  
 {“text writers are agreed what are the rules as to dimensions  
 {“and configuration, which, apart from other considerations,  
 “would lead to the conclusion that a bay is or is not a part  
 “of the territory of the State possessing the adjoining coasts,  
 “and it has never, that they can find, been made the ground  
 “of judicial determination. If it were necessary in this  
 “case to lay down a rule, the difficulty of the task would  
 “not deter their Lordships from attempting to fulfil it. But  
 “in their opinion it is not necessary so to do. It seems to  
 “them that, in point of fact, the British Government has  
 “for a long period exercised dominion over this bay, and  
 “that their claim has been acquiesced in by other nations,  
 “so as to show that the bay has been for a long time occu-  
 “pied exclusively by Great Britain, a circumstance which,  
 “in the tribunals of any country, would be very important.  
 “And, moreover (which in a British tribunal is conclusive),  
 “the British Legislature has by Acts of Parliament declared  
 “it to be part of the British territory, and part of the  
 “country made subject to the Legislature of Newfound-  
 “land” (y).

CCII. In 1822 Russia laid claim to a sovereignty over the Pacific Ocean north of the 51st degree of latitude; but the Government of the United States of America resisted this claim as contrary to the principles of International Law (z).

CCIII. The portion of sea actually occupied by a fleet

(y) *Direct United States Cable Company v. Anglo-American Telegraph Company*, L. R. 2 App. Cas. pp. 419-20.

(z) *Mr. Adams's Letter to the Russian Minister*, March 30, 1822.

riding at anchor is within the dominion of the nation to which the fleet belongs, so long as it remains there; that is, for all purposes of jurisdiction over persons within the limits of the space so occupied. The like principle is applicable to the portion of territory occupied by an army,—a fleet being considered as a maritime army (*a*).

This proposition is of course not to be considered without reference to the place of anchorage: a French fleet permitted to anchor in the Downs; or an English fleet at Cherbourg, would only have jurisdiction over the subjects of the respective countries which happened to be within the limits of their temporary occupation of the water. Both in the case of the fleet and the army, there is, according to the theory of the law, a continuation or prorogation of the territory to which they belong (*b*).

CCIV. The undoubted proposition, that the sea is open to the navigation of all nations, does not carry with it the further proposition, that it is competent to every individual to navigate his ship without any authority from his Government.

Every ship is bound to carry a flag, and to have on board ship's papers (*lettres de mer*) indicating to what nation she belongs, whence she has sailed, and whither she is bound, under pain of being treated as a pirate (*c*).

(*a*) "Videtur autem imperium in maris portionem eadem ratione acquiri ut imperia alia, id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, *ut si classis, qui est maritimus exercitus*, aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur."—*Grotius*, l. ii. c. 3, § xiii. 2.

"Addo, classem quæ stat in anchoris, eam maris partem cui incubat, videri occupasse, eatenus nempe, quatenus et quamdiu occupat. Si occupaverit, transit in imperium et dominium occupantis secundum ea quæ disputavi."—*Cap. iii. s. 4, Bynk. de Dominio Maris*.

*Heffers*, 136.

*Wheaton's Hist.* 723.

(*b*) *Vide post*, further observations on the question of jurisdiction.

(*c*) "Quand on dit que la mer est libre, on ne s'entend parler que des nations, car elle ne l'est point pour des particuliers; ils ne peuvent en

CCV. With respect to seas entirely enclosed by the land, so as to constitute a salt-water lake (*Maria clausa; mers fermées, encloses; Binnenmeere, geschlossene innere Meere*), the general presumption of law is, that they belong to the surrounding territory or territories in as full and complete a manner as a fresh-water lake. The Caspian and the Black Sea naturally belong to this class. Upon the former sea Russia had, by treaty with Persia, the exclusive right of navigating with ships of war; and by the Treaty of the Dardanelles, the Black Sea was practically confined to Russian and Turkish ships of war (*d*).

CCVA. The Treaty of Paris, 1856, contained these special provisions as to the navigation of the Black Sea:—

“ART. XI.—The Black Sea is neutralised: its waters  
“and its ports, thrown open to the mercantile marine of  
“every nation, are formally and in perpetuity interdicted to  
“the flag of war, either of the Powers possessing its coasts,  
“or of any other Power, with the exceptions mentioned in  
“Articles XIV. and XIX. of the present Treaty.

“ART. XII.—Free from any impediment, the commerce  
“in the ports and waters of the Black Sea shall be subject  
“only to regulations of health, customs, and police, framed  
“in a spirit favourable to the development of commercial  
“transactions.

“In order to afford to the commercial and maritime  
“interests of every nation the security which is desired,  
“Russia and the Sublime Porte will admit Consuls into

jouir que sous la sauvegarde de leur gouvernement, et c'est pour établir cette sauvegarde qu'on a institué les *pavillons* et les *lettres de mer*; la sûreté a exigé cette restriction du droit naturel; et tout bâtiment naviguant sans pavillon et sans lettres de mer est traité comme un *forban*.”—*Garden, Traité de Diplomatie*, i. 406.

*Ortolan, Dipl. de la Mer*, t. i. l. ii. c. ix.—*The Louis*, 2 *Dodson Adm. Rep.* 246-7.

(*d*) 2 *De Martens et de Cussy*, 399, Art. 5; *vide supra*, p. 51.

*Hefters*, 140.

*Wheaton's Hist.* 158, 567.

“ their ports situated upon the coast of the Black Sea, in conformity with the principles of International Law.

“ ART. XIII.—The Black Sea being neutralised according to the terms of Article XI., the maintenance or establishment upon its coast of military-maritime arsenals becomes alike unnecessary and purposeless; in consequence, his Majesty the Emperor of All the Russias and his Imperial Majesty the Sultan engage not to establish or to maintain upon that coast any military-maritime arsenal.

“ ART. XIV.—Their Majesties the Emperor of All the Russias and the Sultan, having concluded a Convention for the purpose of settling the force and the number of light vessels, necessary for the service of their coasts, which they reserve to themselves to maintain in the Black Sea, that Convention is annexed to the present Treaty, and shall have the same force and validity as if it formed an integral part thereof. It cannot be either annulled or modified without the assent of the Powers signing the present Treaty.”

There was a subsequent Convention between the Emperor of Russia and the Sultan, limiting their naval force in the Black Sea, signed at Paris, March 30, 1856:—

“ In the Name of Almighty God.

“ His Majesty the Emperor of All the Russias, and his Imperial Majesty the Sultan, taking into consideration the principle of the neutralisation of the Black Sea established by the preliminaries contained in the Protocol No. 1, signed at Paris on the twenty-fifth of February of the present year, and wishing, in consequence, to regulate by common agreement the number and the force of the light vessels which they have reserved to themselves to maintain in the Black Sea for the service of their coasts, have resolved to sign, with that view, a special Convention, and have named for that purpose:

“ His Majesty the Emperor of All the Russias, the Count Orloff and Baron de Brunnow; and his Majesty the



“ Emperor of the Ottomans, Mouhammed Emin Aali Pasha  
“ and Mehemmed Djemil Bey ; who, after having exchanged  
“ their full powers, found in good and due form, have agreed  
“ upon the following Articles :—

“ ART. I.—The high contracting parties mutually en-  
“ gage not to have in the Black Sea any other vessels of  
“ war than those of which the number, the force, and the  
“ dimensions are hereinafter stipulated.

“ ART. II.—The high contracting parties reserve to  
“ themselves each to maintain in that sea six steam vessels  
“ of fifty mètres in length at the time of floatation, of a  
“ tonnage of eight hundred tons at the maximum, and four  
“ light steam or sailing vessels of a tonnage which shall not  
“ exceed two hundred tons each.”

On March 13, 1871, the Treaty of London was concluded between England, Germany, Austria, Italy, France, and the Porte, in which these States announced that they were assembled “ in order to come to an understanding, in a spirit  
“ of concord, with regard to the revision of the stipulations  
“ of the Treaty concluded at Paris on March 30, 1856,  
“ relative to the navigation of the Black Sea, as well as to  
“ that of the Danube.” They then declared Articles XI., XIII. and XIV. of the Treaty of Paris, and the Special Convention between Russia and the Porte annexed to Article XIV., abrogated and replaced by certain Articles that follow, among which is this new Article (III.): “ The  
“ Black Sea remains open as heretofore to the mercantile  
“ marine of all nations”(e). Another Article (IV.) relates  
“ to certain works necessary below Isaktcha to clear the  
“ mouths of the Danube, as well as the neighbouring parts  
“ of the Black Sea.” The Treaty of Paris and its Annexes, except where annulled or modified by the Treaty of London, are renewed and confirmed.

CCVB. Here I must observe that this Treaty of Paris

(e) The States in North and South America have an interest in the observance of this stipulation, though not directly parties to it.

was neither wise in itself, nor fair towards Russia; but the repudiation of it by that State in 1870 was unjustifiable, and set the evil precedent of one party to a treaty shaking off clearly subsisting obligations when the other parties to the treaty happened to be unable to enforce them.

Private contracts may be set aside on the ground of the inferences of fraud and unfair dealing arising from their manifest injustice and want of mutual advantages. But no inequality of advantage, no *lésion*, can invalidate a treaty.

It is truly said by Vattel, “Si l’on pouvait revenir d’un traité, parce qu’on s’y trouverait lésé, il n’y aurait rien de stable dans les contrats des nations” (*f*). No more dangerous attempt has ever been made than that of Russia in 1870 to escape from the obligations of the Treaty of 1856 on this pretext. It is for the historian to dwell upon the hardship inflicted by this Treaty upon Russia, upon the time which she chose for this repudiation of it, and upon the question of the innocence or complicity of Prussia.

The International writer may point with at least some satisfaction to the indignant refusal of all the other Powers to admit the plea of Russia, and to the Protocol which pre-faced the new Treaty of 1871.

At the Conference holden in London to consider the Treaty of 1856, Earl Granville, President of the Conference, said:—“The Conference has been accepted by all the consignatory Powers of the Treaty of 1856, for the purpose of examining without any foregone conclusion, and of discussing with perfect freedom the proposals which Russia desires to make to us with regard to the revision which she asks of the stipulations of the said Treaty, relative to the neutralisation of the Black Sea. This unanimity furnishes a striking proof that the Powers recognise that it is an essential principle of the law of nations that none of them can liberate itself from the engagements of a treaty, nor modify the stipulations

“thereof, unless with the consent of the contracting parties  
“by means of an amicable understanding. This important  
“principle appears to me to meet with general acceptance,  
“and I have the honour to propose to you, gentlemen, to  
“sign a Protocol *ad hoc*.”

The Protocol in question is then submitted to the Conference, and signed by all the Plenipotentiaries (*g*); that is to say, Prussia (or North Germany), Austria, Great Britain, Italy, Russia, Turkey, and by subsequent adoption, France. All subscribed to the maintenance of this primary and elementary principle of International Law, and in the circumstances such subscription was most valuable to the welfare of States; but, alas! that in the year of our Lord 1871 it should have been requisite!

So, lastly, it is to be observed that by a Treaty between Russia and the Porte, signed at London March 13, 1871, it was provided that the Special Convention concluded at Paris in March 1856, between Russia and the Porte relative to the number of vessels of war of the two contracting parties in the Black Sea, “is and remains abrogated.”

This Treaty was communicated to the Conference at London, May 15, 1871.

CCVC. “Constantinople” (says a great historian) “appears to have been formed by nature for the centre and capital of a great monarchy. Situated in the forty-first degree of latitude, the imperial city commanded from her seven hills the opposite shores of Europe and Asia; the climate was healthy and temperate, the soil fertile, the harbour secure and capacious, and the approach on the side of the continent was of small extent and easy defence. The Bosphorus and the Hellespont may be considered as the two gates of Constantinople, and the prince who possessed those important passages could always shut

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(*g*) Protocols of Conferences holden in London respecting the Treaty of March 30, 1856—Papers presented to Parliament, 1871.

“them against a naval enemy, and open them to the fleets of commerce”(h).

“When the passages of the Straits were thrown open for trade, they alternately admitted the natural and artificial riches of the North and South of the Euxine and the Mediterranean”(i).

The rights of the Ottoman Porte over the waters which constitute the passage between the Bosphorus and the Dardanelles have, ever since the conquest of Constantinople by the Turks, been necessarily a matter of great moment to all civilised States. The Porte has always maintained, as the “ancient rule” of the Ottoman Empire, the right to prevent the passage of foreign ships of war through these Straits, both in time of peace and of war. This rule was founded on the general principle that the possessors of both shores of a strait or river had dominion over the contiguous waters. The obligation of this rule *in time of peace* had been acknowledged by England in 1809, and by other States in 1840, 1841, 1856, and 1871. But on this last occasion, for the first time, it was provided that the Porte might “open the said Straits in time of peace to the vessels of war of friendly or allied Powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris”(j).

With this exception the Porte must be taken to have obliged itself to close the Straits in time of peace to vessels of war. It does not appear that any treaty contains provisions on this subject when the Porte may be at war. It would, in the absence of any treaty obligations, be competent to the Porte to close the Straits against an enemy, and to open them to an ally, or, indeed, a neutral not an ally.

(h) *Gibbon*, vol. iii. ch. xviii. pp. 11, 12.

(i) *Ib.* pp. 12, 13.

(j) See a valuable letter by Mr. Holland, Professor of International Law at Oxford, in *The Times* of February 12, 1878.

At the breaking out of the recent war between Russia and the Porte the provisions on this subject were to be found in the Treaties of 1856 and 1871, with certain conventions annexed.

By the former Treaty it was agreed as follows:—

“ In the Name of Almighty God.

“ Their Majesties the Queen of the United Kingdom of Great Britain and Ireland, the Emperor of Austria, the Emperor of the French, the King of Prussia, the Emperor of All the Russias, signing parties to the Convention of July 13, 1841; and his Majesty the King of Sardinia; wishing to record in common their unanimous determination to conform to the ancient rule of the Ottoman Empire, according to which the Straits of the Dardanelles and of the Bosphorus are closed to foreign ships of war, so long as the Porte is at peace :

“ Their said Majesties, on the one part, and his Majesty the Sultan, on the other, have resolved to renew the Convention concluded at London on July 13, 1841, with the exception of some modifications of detail which do not affect the principle upon which it rests.”

Their Majesties named for that purpose certain Plenipotentiaries.

“ ART. I.—His Majesty the Sultan, on the one part, declares that he is firmly resolved to maintain for the future the principle invariably established as the ancient rule of his Empire, and in virtue of which it has, at all times, been prohibited for the ships of war of foreign Powers to enter the Straits of the Dardanelles and of the Bosphorus; and that, so long as the Porte is at peace, his Majesty will admit no foreign ship of war into the said Straits.

“ And their Majesties the Queen of the United Kingdom of Great Britain and Ireland, the Emperor of Austria, the Emperor of the French, the King of Prussia, the Emperor of All the Russias, and the King of Sardinia, on the other part, engage to respect this determination of the

“ Sultan, and to conform themselves to the principle above  
“ declared.

“ ART. II.—The Sultan reserves to himself, as in past  
“ times, to deliver firmans of passage for light vessels under  
“ flag of war, which shall be employed, as is usual, in the  
“ service of the missions of foreign Powers.

“ ART. III.—The same exception applies to the light  
“ vessels under flag of war which each of the contracting  
“ Powers is authorised to station at the mouths of the  
“ Danube in order to secure the execution of the regulations  
“ relative to the liberty of that river, and the number of  
“ which is not to exceed two for each Power.

“ ART. IV.—The present Convention, annexed to the  
“ general Treaty signed at Paris this day, shall be ratified,  
“ and the ratifications shall be exchanged in the space of  
“ four weeks, or sooner if possible” (*k*).

The clause *in extenso* of the Treaty of 1871 is as follows:—

“ ART. II. The principle of the closing of the Straits  
“ of the Dardanelles and the Bosphorus, such as it has been  
“ established by the separate Convention of March 30,  
“ 1856, is maintained, with power to his Imperial Majesty  
“ the Sultan to open the said Straits in time of peace to the  
“ vessels of war of friendly and allied Powers, in case the  
“ Sublime Porte should judge it necessary in order to secure  
“ the execution of the stipulations of the Treaty of Paris of  
“ March 30, 1856.”

In the diplomatic communications between Russia and England, after the breaking out of the recent war between Russia and the Porte, five subjects (*l*) were especially referred to by England, not as affecting European interests generally, though such was the fact, but on the lower and narrower grounds of affecting the particular interests of England.

(*k*) Ratifications exchanged at Paris, April 27, 1856.

(*l*) *Mr. Secretary Cross's Speech* in the House of Commons, 1878.

*Correspondence between Prince Gortschakoff and Lord Derby, 1877.*

These five subjects were Constantinople, the Dardanelles, Egypt, the Suez Canal (*m*), and the Persian Gulf. The Black Sea is not mentioned.

In the month of June, 1877, the Russian Prime Minister wrote a reply to the note of the English Foreign Secretary, in which, among other matters, he states that Russia considered that so important a maritime passage as the Dardanelles, forming the connecting link between the Black Sea and the Mediterranean, must always be regulated by an international agreement, and not by any one Power alone.

At the Congress which produced the recent Treaty of Berlin, the subject of the Dardanelles was introduced in an unsatisfactory manner. It was stated in Article LXIII. of the Treaty of Berlin that the Treaty of Paris of 1856, as well as the Treaty of London of 1871, are maintained in all such of their provisions as are not abrogated or modified by the preceding stipulations.

The Treaty of Berlin contains no Article which, in direct and specific terms, mentions the authority of the Porte or of any other Power on the subject of the passage of the Dardanelles and the Bosphorus. At nearly the end of the Congress Lord Salisbury (*n*) wrote to her Majesty's Principal Secretary of State as follows:—

“ Berlin, July 11, 1878.

“ Sir,—I have the honour to enclose a copy of a declaration which I placed upon the Protocol with reference to the closing of the Straits to vessels of war.

“ The Second Article of the Treaty of London reserves to his Imperial Majesty the Sultan ‘ power to open the said Straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary in order to secure the execution

(*m*) Lord Derby, writing to Count Schouvaloff, May 6, 1877, considers this question as “ foremost ” among English interests.

(*n*) *Correspondence relating to the Congress of Berlin, with the Protocol of the Congress, laid before Parliament, 1878, p. 214.*

“of the stipulations of the Treaty of Paris.’ But the  
“stipulations of the Treaty of Paris will be materially  
“modified by the Treaty of Berlin. The precise circum-  
“stances, therefore, which would be held to justify the  
“Sultan in opening the Straits to his allies are left in some  
“ambiguity. The proposed Article, to the effect ‘that the  
“Treaties of Paris and London shall be maintained in all  
“such of their provisions as are not abrogated by the Treaty  
“of Berlin,’ will not furnish a complete solution of the  
“difficulty: for there are important provisions in the Treaty  
“of Berlin, connected with modifications of that part of the  
“Treaty of Paris which concerns the Black Sea, which may  
“not necessarily be construed as taking the place of the  
“Treaty of Paris for the purposes of Article II. of the  
“Treaty of London. The provision that Batoum is to  
“remain essentially a commercial port is an instance in  
“point. Doubts might hereafter be raised whether the  
“Treaty of Berlin and the Treaty of Paris had been so  
“incorporated that a breach of this stipulation would be  
“such a violation of the Treaty of Paris as would justify  
“the Sultan in opening the Black Sea to his allies. The  
“Congress, which was approaching the term of its labours,  
“was disinclined to enter into the discussion of a question  
“difficult in its character, and upon which protracted con-  
“troversy would probably have arisen. Under these cir-  
“cumstances I thought it necessary to reserve to England  
“a general liberty of interpreting according to the spirit of  
“existing Treaties the engagements which Article LXIII.  
“of the Treaty of Berlin will create.

“I have, &c.

“SALISBURY.”

The following passages are taken from the Protocols of the Berlin Congress:—

“With regard to the paragraph relating to the Treaties of Paris and London, Lord Salisbury remarks that at first



“sight, at a preceding sitting, he had stated that he was not  
 “satisfied with the wording of this Article. These appre-  
 “hensions are now partly set at rest by the explanations  
 “offered to the Congress: his Excellency confines himself  
 “to-day to asking that the following declaration, which is  
 “binding only on his Government, may be inserted in the  
 “Protocol:—‘Considering that the Treaty of Berlin will  
 “modify an important part of the arrangements sanctioned  
 “by the Treaty of Paris of 1856, and that the interpreta-  
 “tion of Article II. of the Treaty of London, which is  
 “dependent on the Treaty of Paris, may thus become a  
 “matter of dispute; I declare on behalf of England that  
 “the obligations of her Britannic Majesty relating to the  
 “closing of the Straits do not go further than an engage-  
 “ment with the Sultan to respect in this matter his  
 “Majesty’s independent determinations in conformity with  
 “the spirit of existing Treaties’ (o).

“Count Schouvaloff reserves the right of inserting in the  
 “Protocol a counter-declaration, if necessary.”

He afterwards exercised this right; for it appears from  
 the Protocol of the next and last sitting but one of the  
 Congress, “Count Schouvaloff, referring to the declaration  
 “made in the preceding sitting by Lord Salisbury on the  
 “subject of the Straits, demands the insertion in the Pro-  
 “tocol of a declaration on the same subject presented by  
 “the Plenipotentiaries of Russia: ‘The Plenipotentiaries  
 “of Russia, without being able exactly to appreciate the  
 “meaning of the proposition of the second Plenipotentiary

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(o) *Correspondence relating to the Congress of Berlin, &c., laid before  
 Parliament, 1878, p. 270; Protocol, 18; Sitting of July 11, 1878.*

*Ib. p. 213:* “Considérant que le Traité de Berlin changera une partie  
 importante des arrangements sanctionnés par le Traité de Paris de 1856,  
 et que l’interprétation de l’Article II du Traité de Londres qui dépend  
 du Traité de Paris peut ainsi être sujet à des contestations :

“Je déclare de la part de l’Angleterre que les obligations de sa  
 Majesté Britannique concernant la clôture des Détroits se bornent à un  
 engagement envers le Sultan de respecter à cet égard les déterminations  
 indépendantes de sa Majesté Impériale, conformes à l’esprit des Traités  
 existants.”

“of Great Britain respecting the closing of the Straits,  
 “restrict themselves to demanding, on their part, the  
 “insertion in the Protocol of the observation, that, in their  
 “opinion, the principle of the closing of the Straits is an  
 “European principle, and that the stipulations concluded in  
 “this respect in 1841, 1856, and 1871, confirmed at present  
 “by the Treaty of Berlin, are binding on the part of all  
 “the Powers, in accordance with the spirit and letter of the  
 “existing Treaties, not only as regards the Sultan, but also  
 “as regards all the Powers signatory to these transac-  
 “tions’” (p).

So the matter ended as far as the Congress at Berlin was concerned. One of all the Powers announced a particular exposition of a portion of the Treaty about to be made, “binding only on his Government.” It would be difficult to maintain that this exposition in a Protocol can affect the plain meaning of Article LXIII. of the Treaty.

CCVI. There is another class of enclosed seas to which the same rules of law are applicable—seas which are landlocked, though not entirely surrounded by land. Of these, that great inlet which washes the coasts of Denmark, Sweden, Russia, and Prussia, the *Ostsee* as the Germans call it, the *Baltic Sea* according to its usual appellation, is the principal (q).

(p) *Correspondence relating to the Congress of Berlin, &c., laid before Parliament, 1878*, pp. 277, 243: “Les Plénipotentiaires de Russie, sans pouvoir se rendre exactement compte de la proposition de M. le Second Plénipotentiaire de la Grande-Bretagne concernant la clôture des Détroits, se bornent à demander de leur côté l’insertion au Protocole de l’observation, qu’à leur avis, le principe de la clôture des Détroits est un principe européen, et que les stipulations conclues à cet égard en 1841, 1856, et 1871, confirmées actuellement par le Traité de Berlin, sont obligatoires de la part de toutes les Puissances, conformément à l’esprit et à la lettre des Traités existants, non-seulement vis-à-vis du Sultan, mais encore vis-à-vis de toutes les Puissances signataires de ces transactions.”

(q) *Heffters*, 143, n. 2.

## CHAPTER IX.

## PECULIAR CASE OF THE ISTHMUS OF CENTRAL AMERICA.

CCVII. The most remarkable, and perhaps the most important, instance of the establishment of the *jus transitus innoxii* is afforded by the recent Convention between Great Britain and the United States respecting the *Isthmus of Central America*, which connects the great highways of the world, the Atlantic and Pacific Oceans. The Treaty concerns the formation of a *ship-canal*, or of a *railway* over this strip of land. This Treaty, both on account of its *immediate object*, and the *principle* which it expressly recognizes and recites, is of such vast importance, both to the present and future interests of mankind, that it is necessary to state the provisions *in extenso*.

The preamble set forth that, "Her Britannic Majesty  
"and the United States of America being desirous of con-  
"solidating the relations of amity which so happily subsist  
"between them, by setting forth and fixing in a Convention  
"their views and intentions with reference to any means of  
"communication by ship-canal, which may be constructed  
"between the Atlantic and Pacific Oceans by the way of the  
"river St. Juan de Nicaragua, and either or both of the  
"lakes of Nicaragua or Managua, to any port or place on  
"the Pacific Ocean," &c.

The Articles were as follows:—"Art. 1. The Govern-  
"ments of Great Britain and the United States hereby de-  
"clare that neither the one nor the other will ever obtain or  
"maintain for itself any exclusive control over the said ship-  
"canal; agreeing that neither will ever erect or maintain  
"any fortifications commanding the same, or in the vicinity

“thereof, or occupy, or fortify, or colonise, or assume or  
 “exercise any dominion over Nicaragua, Costa Rica, the  
 “Mosquito Coast, or any part of Central America (a); nor  
 “will either make use of any protection which either affords  
 “or may afford, or any alliance which either has or may  
 “have, to or with any State or people, for the purpose of  
 “erecting or maintaining any such fortifications, or of occu-  
 “pying, fortifying, or colonizing Nicaragua, Costa Rica,  
 “the Mosquito Coast, or any part of Central America, or  
 “of assuming or exercising dominion over the same. Nor  
 “will Great Britain or the United States take advantage of  
 “any intimacy, or use any alliance, connection, or influence  
 “that either may possess with any State or Government  
 “through whose territory the said canal may pass, for the  
 “purpose of acquiring or holding, directly or indirectly, for  
 “the subjects or citizens of the one, any rights or advan-  
 “tages, in regard to commerce or navigation through the  
 “said canal, which shall not be offered, on the same terms,  
 “to the subjects or citizens of the other.

“Art. 2. Vessels of Great Britain or the United States  
 “traversing the said canal shall, in case of war between the  
 “contracting parties, be exempted from blockade, detention,  
 “or capture by either of the belligerents; and this provision  
 “shall extend to such a distance from the two ends of the  
 “said canal as it may hereafter be found expedient to  
 “establish.

“Art. 3. In order to secure the construction of the said  
 “canal, the contracting parties engage that if any such  
 “canal shall be undertaken upon fair and equitable terms  
 “by any parties having the authority of the local govern-  
 “ment or governments through whose territory the same  
 “may pass, then the persons employed in making the said  
 “canal, and their property used or to be used for that object  
 “shall be protected, from the commencement of the said  
 “canal, to its completion, by the Governments of Great

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(a) *Vide infra*, p. 309.

“ Britain and the United States, from unjust detention, confiscation, seizure, or any violence whatsoever.

“ Art. 4. The contracting parties will use whatever influence they respectively exercise with any State, States, or Governments possessing, or claiming to possess, any jurisdiction or right over the territory which the said canal shall traverse, or which shall be near the waters applicable thereto, in order to induce such States or Governments to facilitate the construction of the said canal by every means in their power; and, furthermore, Great Britain and the United States agree to use their good offices, wherever or however it may be most expedient, in order to procure the establishment of two free ports, one at each end of the said canal.

“ Art. 5. The contracting parties farther engage, that when the said canal shall have been completed, they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said canal may for ever be open and free, and the capital invested therein secure. Nevertheless, the Governments of Great Britain and the United States, in according their protection to the construction of the said canal, and guaranteeing its neutrality and security when completed, always understand that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments or either Government should deem that the persons or company undertaking or managing the same adopt or establish such regulations concerning the traffic thereupon as are contrary to the spirit and intention of this Convention, either by making unfair discriminations in favour of the commerce of one of the contracting parties over the commerce of the other, or by imposing oppressive exactions or unreasonable tolls upon passengers, vessels, goods, wares, merchandise, or other articles. Neither party, however, shall withdraw the aforesaid protection and guarantee, without first giving six months' notice to the other.

“ Art. 6. The contracting parties in this Convention  
“ engage to invite every State with which both or either  
“ have friendly intercourse, to enter into stipulations with  
“ them, similar to those which they have entered into with  
“ each other, to the end that all other States may share in  
“ the honour and advantage of having contributed to a work  
“ of such general interest and importance as the canal herein  
“ contemplated; and the contracting parties likewise agree  
“ that each shall enter into treaty stipulations with such of  
“ the Central American States as they may deem advisable,  
“ for the purpose of more effectually carrying out the great  
“ design of this Convention, namely, that of constructing  
“ and maintaining the said canal as a ship communication  
“ between the two oceans for the benefit of mankind, on  
“ equal terms to all, and of protecting the same; and they  
“ also agree, that the good offices of either shall be em-  
“ ployed, when requested by the other, in aiding and as-  
“ sisting the negotiation of such treaty stipulations; and  
“ should any differences arise as to right or property over  
“ the territory through which the said canal shall pass,  
“ between the States or Governments of Central America,  
“ and such differences should in any way impede or obstruct  
“ the execution of the said canal, the Governments of Great  
“ Britain and the United States will use their good offices  
“ to settle such differences, in the manner best suited to  
“ promote the interests of the said canal, and to strengthen  
“ the bonds of friendship and alliance which exist between  
“ the contracting parties.

“ Art. 7. It being desirable that no time should be  
“ unnecessarily lost in commencing and constructing the  
“ said canal, the Governments of Great Britain and the  
“ United States determine to give their support and en-  
“ couragement to such persons or company as may first offer  
“ to commence the same, with the necessary capital, the  
“ consent of the local authorities, and on such principles as  
“ accord with the spirit and intention of this Convention:  
“ and if any persons or company should already have, with

“ any State through which the proposed ship-canal may  
“ pass, a contract for the construction of such a canal as that  
“ specified in this Convention, to the stipulations of which  
“ contract neither of the contracting parties in this Conven-  
“ tion have any just cause to object, and the said persons or  
“ company shall, moreover, have made preparations and  
“ expended time, money, and trouble on the faith of such  
“ contract, it is hereby agreed that such persons or company  
“ shall have a priority of claim over every other person,  
“ persons, or company, to the protection of the Governments  
“ of Great Britain and the United States, and be allowed a  
“ year, from the date of the exchange of the ratifications of  
“ this Convention, for concluding their arrangements, and  
“ presenting evidence of sufficient capital subscribed to  
“ accomplish the contemplated undertaking; it being under-  
“ stood that if, at the expiration of the aforesaid period, such  
“ persons or company be not able to commence and carry out  
“ the proposed enterprise, then the Governments of Great  
“ Britain and the United States shall be free to afford their  
“ protection to any other persons or company that shall be  
“ prepared to commence and proceed with the construction  
“ of the canal in question.

“ Art. 8. The Governments of Great Britain and the  
“ United States having not only desired, in entering into  
“ this Convention, to accomplish a particular object, but also  
“ *to establish a general principle*, they hereby agree to extend  
“ their protection by treaty stipulations to any other prac-  
“ ticable communications, *whether by canal or railway*, across  
“ the isthmus which connects North and South America;  
“ and especially to the interoceanic communications, should  
“ the same prove to be practicable, whether by canal or  
“ railway, which are now proposed to be established by the  
“ way of Tehuantepec or Panama. In granting, however,  
“ *their joint protection to any such canals or railways* as are  
“ by this Article specified, it is always understood by Great  
“ Britain and the United States, that the parties constructing  
“ or owning the same shall impose no other charges or con-

“ditions of traffic thereupon than the aforesaid Governments  
 “shall approve of as just and equitable; and that the same  
 “canals or railways, being open to the subjects and citizens  
 “of Great Britain and the United States on equal terms,  
 “shall also be open on like terms to the subjects and  
 “citizens of every other State which is willing to grant  
 “thereto such protection as Great Britain and the United  
 “States engage to afford.

“Art. 9. The ratifications of this Convention shall be  
 “exchanged at Washington within six months from this day,  
 “or sooner if possible.

“In faith whereof, we, the respective Plenipotentiaries,  
 “have signed this Convention, and have hereunto affixed  
 “our Seals.

“Done at Washington, the nineteenth day of April anno  
 “Domini One thousand eight hundred and fifty.

(Signed) “HENRY LYTTON BULWER.

“JOHN M. CLAYTON” (b).

CCVIII. Before the ratifications were exchanged, it was explained by the British to the American Plenipotentiary, that the words “or any part of Central America” were not to apply to the British settlements in Honduras, or its dependencies. This explanation was fully adopted by the American Plenipotentiary, and the ratifications were exchanged. The Treaty was subsequently submitted by the President of the United States to the Senate (c), and was approved of, after discussion, by that deliberative assembly.

It was, however, contended by certain persons averse from the conditions of the Treaty, that the Senate did not understand that the Treaty was to be construed with reference to the American Plenipotentiary’s consent, which had been expressed in the reply to the British Plenipotentiary’s explanation with respect to the Honduras, and consequently

(b) *Annual Register* (1850), pp. 387–390.

(c) *Vide supra*, § cxix.



that the Senate had in reality not assented to the Treaty so qualified.

Though there is no ground for this supposition, the objection evinces how much a knowledge of the department of Government in which the power of making and ratifying Treaties is vested by the Constitution of each State, is necessary for the security of the foreign relations of all States.

CCIX. The reason of the thing would indeed seem to have excluded the Honduras, as the terms were employed in the Treaty, even without the subsequent express limitation, from the category of "Central America," though geographically and literally within the scope of the expressions. It is true that Great Britain had originally only certain limited *jura in re* with respect to the Honduras, such as the right of cutting mahogany and logwood conceded to her by Treaties with Spain, the right of sovereignty being reserved to the Crown of the latter country; yet since Spain has ceased to exercise any sovereignty, either at Honduras or in the circumjacent territory, and the British jurisdiction is exercised there under a Commission of the Crown which has been recognized by the United States, inasmuch as their Consul is received at Belize under the *exequatur* of the British Crown, Honduras, therefore, was justly considered as both *de facto* and *de jure* a British settlement; and the terms in the Treaty appear, by the ordinary and admitted rules of construction (*d*) applied with reference to the subject-matter and context of the Treaty, not to include the British possession of Honduras (*e*).

The discordant constructions put by England and the United States upon this Treaty did not, as has been shown, receive a satisfactory adjustment until 1859-60, when England, by separate Treaties with Honduras and Nicaragua,

(*d*) *Vide post*, chapter on TREATIES, vol. ii. part v. chap. viii.

(*e*) "Convention entre sa Majesté le Roi de la Grande-Bretagne et sa Majesté le Roi d'Espagne, conclue à Londres le 14 juillet 1786."—*Martens, Rec. de Tr.* iv. (1786), pp. 133-140.

*Annual Register*, 1787, p. 78.

relinquished the Mosquito protectorate, and recognized the Bay Islands as part of the Republic of Honduras (*f*).

The neutral character of this ship-canal between the Atlantic and Pacific Oceans has been thus recognized and established. The neutrality of what is called the "Honduras Interoceanic Railway" was guaranteed by a Convention of August 27, 1856, between Great Britain and Honduras (*g*).

(*f*) *De Martens*, vol. xlv. p. 374; *Hertslet's Treaties*, vol. xi. p. 367.

(*g*) *Lawrence's Wheaton*, i. p. 478; *Hertslet's Treaties*, vol. x. p. 871. The contract between the State of New Granada and the Panama Railway Company is given in the *State Papers*, vol. xlii. p. 1187. In 1846 the United States and New Granada entered into a Treaty of Commerce and Navigation.—*State Papers*, vol. xxxvi. p. 994. See also Treaty between England and the United States of Colombia, February 16, 1866.

## CHAPTER X.

## SELF-PRESERVATION.

CCX. THE Right of Self-Preservation, by that defence which prevents, as well as that which repels, attack, is the next International Right which presents itself for discussion, and which, it will be seen, may under certain circumstances, and to a certain extent, modify the Right of Territorial Inviolability.

CCXI. The Right of Self-Preservation is the first law of nations, as it is of individuals. A society which is not in a condition to repel aggression from without, is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution (a).

All means which do not affect the independence of other nations are lawful for this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect.

CCXII. The means by which a nation usually provides for her safety are—1. By alliances with other States. 2. By maintaining a military and naval force. And 3. By erecting fortifications, and taking measures of the like kind within her own dominions. Her full liberty in this respect cannot, as a general principle of International Law, be too boldly announced or too firmly maintained; though some modification of it appears to flow from the equal and corresponding

(a) *Vattel*, t. i. c. xiv. s. 177. Οὐ γὰρ αἰρεσίς ἐστιν ἡμῖν τοῦ πράγματος, ἀλλ' ὑπολείπεται τὸ δικαιοτάτον καὶ ἀναγκαϊότατον τῶν ἔργων, ὃ ὑπερβαίνουσιν ἐκόντες οὗτοι. τί οὖν ἐστὶ τοῦτο; δμύνεσθαι τὸν πρότερον πολεμοῦνθ' ἡμῖν.—*Demosth.* περὶ τῶν ἐν Χερρόν, c. 91. Est igitur hæc non scripta sed nata lex, etc.—*Cic. pro Milone*, c. 4.

rights of other nations, or at least to be required for the sake of the general welfare and peace of the world.

CCXIII. Armaments suddenly increased to an extraordinary amount are calculated to alarm other nations, whose liberty they appear, more or less, according to the circumstances of the case, to menace (*b*).

It has been usual, therefore, to require and receive amicable explanations of such warlike preparations; the answer will, of course, much depend upon the tone and spirit of the requisition.

Thus the British Secretary for Foreign Affairs (Lord Grenville), in 1793, replied to Monsieur Chauvelin (who had been the accredited minister of the King of France, and remained in England after the Republic was declared), "It is added, that if these explanations should appear to us unsatisfactory; if you are again obliged to hear the language of haughtiness; if hostile preparations are continued in the ports of England, after having exhausted everything which could lead to peace, you will dispose yourselves to war.

"If this notification, or that which related to the treaty of commerce, had been made to me in a regular and official form, I should have found myself obliged to answer, that a threat of declaring war against England, because she thinks proper to augment her forces, as well as a declaration of breaking a solemn treaty, because England has adopted for her own security precautions of the same nature as those which are already established in France, could neither of them be considered in any other light than that of new offences, which, while they subsisted, would preclude all negotiation" (*c*).

CCXIV. We have hitherto considered what measures a nation is entitled to take, for the preservation of her safety, *within* her own dominions. It may happen that the same

(*b*) *Martens*, l. iv. c. i. pp. 116-7-8.

(*c*) *State Papers during the War*, Lond. 1794, p. 242.

Right may warrant her in extending precautionary measures *without* these limits, and even in transgressing the borders of her neighbour's territory. For International Law considers the Right of Self-Preservation as prior and paramount to that of Territorial Inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right.

The case of conflict indeed must be indisputable, *pomeridiana luce clarior* in the language of canonists. Such a case, however, is quite conceivable. A rebellion, or a civil commotion, it may happen, agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the contiguous State, and from thence, with restored strength and fresh appliances, renew their invasions upon the State from which they have escaped. The invaded State remonstrates. The remonstrance, whether from favour to the rebels, or feebleness of the executive, is unheeded, or, at least, the evil complained of remains unredressed.

In this state of things the invaded State is warranted by International Law in crossing the frontier, and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their stronghold, as the exigencies of the case may fairly require.

CCXV. Vattel maintains strongly this opinion: "*Il est certain que si mon voisin donnait retraite à mes ennemis lorsqu'ils auraient du pire et se trouveraient trop faibles pour m'échapper, leur laissant le temps de se refaire, et d'épier l'occasion de tenter une nouvelle irruption sur mes terres, cette conduite, si préjudiciable à ma sûreté et à mes intérêts, serait incompatible avec la neutralité. Lors donc que mes ennemis battus se retirent chez lui, si la charité ne lui permet pas de leur refuser passage et sûreté, il doit les faire passer outre le plus tôt possible, et ne point souffrir qu'ils se tiennent aux aguets pour m'attaquer de nouveau; autrement il me met en droit de les aller chercher dans ses*

“*terres. C'est ce qui arrive aux nations qui ne sont pas en état de faire respecter leur territoire ; le théâtre de la guerre s'y établit bientôt ; on y marche, on y campe, on s'y bat, comme dans un pays ouvert à tous venants*” (d).

CCXVI. The hypothetical case here described was that which Great Britain alleged to have actually occurred, except that the circumstances were of a more aggravated character, with respect to the invasion of her Canadian possessions in 1838. For she alleged that the Canadian rebels not only found shelter on the American frontier of the Niagara, but that American citizens joined the rebels, and that they obtained arms, by force indeed, from the American arsenals, and that shots were fired from an Island within the American territories, while a steamer called the *Caroline* was employed in the transport of munitions of war to the Island, which when not so employed was moored off the American shore. In this state of things a British captain and crew, having boarded and forcibly captured the *Caroline*, cut her adrift, and sent her down the falls of Niagara. The act was made the subject of complaint, on the ground of violation of territory, by the American Government, and vindicated by Great Britain on the ground of self-preservation ; which, if her version of the facts were correct, was a sufficient answer and a complete vindication.

CCXVII. In 1826, the mustering and equipment of Portuguese rebels (e) on the Spanish frontier, unchecked by the Spanish authorities, was considered by Great Britain as obliging her to consider that “*casus fœderis*,” on the happening of which she was bound to assist her ally, to have actually arisen ; and she accordingly sent troops to Portugal.

CCXVIII. Upon the same principle, though a nation has a right to afford refuge to the expelled governors, or even the leaders of rebellion flying from another country, she is bound

(d) Lib. iii. c. vii. s. 133.

(e) Mr. Canning's Speech on the King's message relative to the affairs of Portugal, December 12th, 1820.—*Canning's Speeches*, vol. vi. p. 60.

to take all possible care that no hostile expedition is concerted in her territories, and to give all reasonable guarantees upon this subject, in answer to the remonstrances of the nation from which the exiles have escaped (*f*). During the time when the residence of the Pretender in France within the vicinity of England gave reasonable alarm to the British Government, the removal of his residence to a place of less danger to Great Britain formed the subject of the stipulations of various Treaties. If the hostile expedition of the late Emperor of the French in 1842 against the then existing monarchy of France had taken place with the sanction or connivance of the British Government, England would have been guilty of a very gross violation of International Law; and she showed at the time a wise and just anxiety to purge herself from any such suspicion. But though the strange vicissitudes of fortune afterwards compelled the very monarch against whom that expedition had been directed to take refuge in this country, the then representative of the executive of France, though the leader of that expedition, had no cause of complaint, either on this ground, or because other political refugees, professing all shades and kinds of opinion, resided in safety in England; which, before it was their refuge, had so often been, and indeed still is, the theme of their vituperation.

CCXIX. In all cases where the territory of one nation is

(*f*) "Les Princes de Transylvanie refuseront asyle aux ennemis de la Maison d'Autriche et réciproquement cette Puissance ne pourra donner retraite aux ennemis des Princes et Etats de Transylvanie."—*Traité de Vienne*, Art. 12; *Mably, Le Droit public*, t. ii. p. 50.

"L'année 1716 fut employée en négociations entre la France, l'Angleterre, et les Provinces-Unies; et dans la suivante, ces Puissances signèrent à la Haye le Traité de la *Triple Alliance*. La France se chargeoit d'engager le Chevalier de Saint-Georges à sortir du comtat d'Avignon, pour se retirer au-delà des Alpes. Chaque contractant promettoit de ne donner aucun asyle sur ses terres aux personnes qui seroient déclarées rebelles par l'un des deux autres."—*Ib.* p. 19.

"La France promet de ne point reconnoître les droits que le fils du Roi Jacques II peut avoir sur l'Angleterre, et de ne le pas souffrir sur ses terres."—*Traité d'Ut. fr.-ang.* Art. 4; *Ib.* p. 157.

invaded from the country of another—whether the invading force be composed of the refugees of the country invaded, or of subjects of the other country, or of both—the Government of the invaded country has a right to be satisfied that the country from which the invasion has come has neither by *sufferance* nor *reception* (*patientia aut receptu*) knowingly aided or abetted it. She must purge herself of both these charges; otherwise, if the cause be the feebleness of her Government, the invaded country is warranted in redressing her own wrong, by entering the territory, and destroying the preparations of war therein made against her; or, if these have been encouraged by the Government, then the invaded country has a strict right to make war upon that country herself; because she has afforded not merely an asylum, but the means of hostility, to the foes of a nation with whom she was at peace. For it never can be maintained, however such a State may suffer from piratical incursions, which the feebleness of the executive Government of the country whence they issue renders it incapable of preventing or punishing, that, until such Government shall *voluntarily acknowledge* the fact, the injured State has no right to give itself that security, which its neighbour's Government admits that it ought to enjoy, but which that Government is unable to guarantee.

It must be admitted that there is a *practical* acknowledgment of such inability, which, as much as a voluntary confession, justifies the offended country in a course of action which would under other circumstances be unlawful. There is a very important chapter, both in Grotius, and in his commentator Heineccius, entitled “*De Pœnarum Communicatione*,” as to when the guilt of a malefactor, and its consequent punishment, is communicated to others than himself; and the question is particularly considered with reference to the responsibility of a State for the conduct of its citizens. The tests for discovering “*Civitasne deliquerit an cives?*” are laid down with great precision and unanimity of sentiment by all Publicists, and are generally reduced to two, as will be



seen from the following extract from Burlamaqui (*g*) (who repeats the opinion of Grotius (*h*) and Heineccius):—"In civil societies" (he says), "when a particular member has done an injury to a stranger, the governor of the commonwealth is sometimes responsible for it, so that war may be declared against him on that account. But to ground this kind of imputation, we must necessarily suppose one of these two things, *sufferance* or *reception* (*i*), viz. either that the sovereign has suffered this harm to be done to the stranger, or that he afforded a retreat to the criminal. In the former case it must be laid down as a maxim, that a sovereign who, knowing the crimes of his subjects—as, for example, that they *practise piracy* on strangers,—and being also able and obliged to hinder it, does not hinder it, renders himself criminal, because he has consented to the bad action, the commission of which he has permitted, and consequently furnished a just reason of war. The two conditions above mentioned, I mean the knowledge and sufferance of the sovereign, are absolutely necessary, the one not being sufficient without the other to communicate any share in the guilt. Now it is presumed that a sovereign knows what his subjects openly and frequently commit; and as to his power of hindering the evil, this likewise is always presumed, unless the want of it be clearly proved." So Vattel (*j*): "Si un souverain qui pourrait retenir ses sujets dans les règles de la justice et de la paix, souffre qu'ils maltraitent une nation, ou dans son corps ou dans

(*g*) *The Principles of Natural and Public Law*, by J. J. Burlamaqui, Professor at Geneva. I only possess the English translation, London, 1703. Sir J. Mackintosh calls him "an author of distinguished merit."

(*h*) See Grotius de *J. B. et P.* l. ii. c. xxi.: *De Pœnarum Communicatione*; and the admirable *Prælectiones* of Heineccius on this chapter.

Vattel, l. ii. c. vi.: "De la part que la nation peut avoir aux actions de ses citoyens."

(*i*) "Patientia aut receptu."—Grot. & Heinecc.

(*j*) Book ii. c. vi. s. 72.

“ses membres, il ne fait pas moins de tort à toute la nation, que s’il la maltraitait lui-même” (*k*).

The act of an individual citizen, or of a small number of citizens, is not to be imputed, without special proof, to the nation or Government of which they are subjects (*l*). A different rule would of course apply to the acts of large numbers (*m*) of persons, especially if they appeared in the array and with the weapons of a military force, as in the case of the invasion of Portugal which has been referred to above.

CCXX. The consideration of the means by which nations have enabled themselves to perform this duty towards their neighbours and the rest of the world, and of the very important and much-vexed question of the lawfulness of allowing a friendly Power to raise troops in a neutral territory, will be discussed when we enter upon the Right of Jurisdiction, incident to a State, over all persons and things within the territory, and also in a later part of this work upon the

(*k*) Letter to Lord Ashburton, by *R. Phillimore*, pp. 27, 183. London, 1842.

(*l*) “Cependant, comme il est impossible à l’Etat le mieux réglé, au souverain le plus vigilant et le plus absolu, de modérer à sa volonté toutes les actions de ses sujets, de les contenir en toute occasion dans la plus exacte obéissance, il serait injuste d’imputer à la nation ou au souverain toutes les fautes des citoyens. On ne peut donc dire, en général, que l’on a reçu une injure d’une nation, parce qu’on l’aura reçue de quelqu’un de ses membres (on ne peut imputer à la nation les actions des particuliers).”—*Vattel*, t. i. l. ii. c. vi. s. 73.

(*m*) *Hefters*, zweites Buch, *Völkerrecht im Zustand des Unfriedens*, s. 148, pp. 258-9: After saying that what the State may not lawfully do collectively it may not do individually—“Sollte freilich die Theilnahme der Unterthanen eine *massenhafte* werden, dadurch die Aufmerksamkeit und Bedenklichkeit der Gegenpartei erregen, demnach Represalien derselben befürchten lassen.”

*Zouch*, de *Judicio inter Gentes*, pars ii. s. vi. p. 120 (ed. Oxoniæ, 1650): “An *repræsalie* sint licitæ? Imperator Zeno æquitati naturali contrarium dicit ut, pro alieno debito, alii molestantur; et in Novella Justiniani prohibentur pignorationes pro aliis: addita causa, quod rationem non habet, alium esse debitorem, alium exigi: *Jure tamen Gentium* introductum apparet, ut pro eo quod præstare debet civilis societas, aut ejus caput, sive per se primo, sive quod alieno debito jus non reddendo se obstrinxerint, *obligata sint omnia bona subditorum*.”

**Rights and Duties of Neutrals.** But this present is not an unfit place for offering some general remarks upon the control exercised by the State over strangers, whether domiciled and commorant (*habitans*), or merely travellers through the country (*étrangers qui passent*) (*n*).

It is a received maxim of International Law, that the Government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it. According to the Law of England, local allegiance is due from an alien or stranger born, so long as he continues within the protection and dominion of the Crown; and it ceases the instant he transfers himself from this kingdom to another. The allegiance and the protection of the stranger, therefore, are both confined, in point of time, to the duration of the residence; and in point of locality, to the dominion of the British Empire (*o*). During periods of revolutionary disturbances both on the Continent and within this kingdom, it has been customary to pass Acts of Parliament authorizing certain high officers of the State to order the departure of aliens from the realm within a specified time, and their imprisonment in case of refusal. These Acts have generally been limited in their duration: the operation of the last was confined to the period of one year (*p*).

(*n*) *Vattel*, l. i. c. xix. s. 213, l. ii. c. viii. *passim*.

(*o*) *Calvin's case*, 7 *Coke's Reports*, 6 a.

*Stephen's Blackstone*, vol. ii. book iv. pt. i. c. 2.

1 *Hale's Pleas of the Crown*, 60.

(*p*) "This power," as Mr. Canning observed, "had undoubtedly been exercised by the Crown, sometimes with, sometimes without, the consent of Parliament" (5 *Canning's Speeches*, p. 255). The 33 Geo. III. c. 4, A.D. 1793, was the first Alien Act passed by the Parliament of this kingdom, and was followed up by Lord Grenville's note, dismissing Monsieur Chauvelin.

(*Translation.*)

"Whitehall, Jan. 24, 1793.

"I am charged to notify to you, Sir, that the character with which you have been invested at this Court, and the functions of which have been

so long suspended, being now entirely terminated by the fatal death of his late Most Christian Majesty, you have no more any public-character here.

"The King can no longer, after such an event, permit your residence here. His Majesty has thought fit to order that you should retire from this kingdom within the term of eight days; and I herewith transmit to you a copy of the order which his Majesty, in his Privy Council, has given to this effect.

"I send you a passport for yourself and your suite; and I shall not fail to take all the other necessary steps, in order that you may return to France with all the attentions which are due to the character of Minister Plenipotentiary from his Most Christian Majesty, which you have exercised at this Court.

"I have the honour to be, &c.

"GRENVILLE."

(*State Papers on the War*, p. 245.)

This Act was followed up by the under-mentioned statutes, all now repealed:—

38 Geo. III. c. 50, 77.

56 Geo. III. c. 86.

41 Geo. III. c. 24.

58 Geo. III. c. 96.

42 Geo. III. c. 92.

1 Geo. IV. c. 105.

43 Geo. III. c. 155.

3 Geo. IV. c. 97.

54 Geo. III. c. 155.

5 Geo. IV. c. 37.

55 Geo. III. c. 54.

The last Statute was passed on June 9, 1848, 11 & 12 Vict. c. 20, "An Act to authorize for one Year and to the end of the then next Session of Parliament the Removal of Aliens from the Realm."

*Horner's Memoirs*, vol. ii. p. 522. Speech on the Alien Bill, 1816.

## CHAPTER XI.

RIGHT TO A FREE DEVELOPMENT OF NATIONAL  
RESOURCES BY COMMERCE.

CCXXI. THIS Right (*a*) is little more than a consequence from what has been already stated with respect to the free navigation of the ocean, and the exceptions which International Law has sanctioned in the case of particular portions of the ocean. The general law as to the perfect liberty of commerce incident to every nation is forcibly and truly stated by Grotius (*b*): “Quominus gens quæque cum quavis gente  
“seposita commercium colat, impediendi nemini jus est: id  
“enim permitti interest societatis humanæ; nec cuiquam  
“damno id est: nam etiam si cui lucrum speratum, sed non  
“debitum, decedat, id damni vice reputari non debet.”

The extravagant pretensions of Spain and Portugal to exclusive commerce with the East and West Indies, and their practical abandonment, have been discussed in a former chapter. It is, however, perfectly competent to any nation to make what regulations it pleases with respect to its own commerce, to admit every nation equally to it, to exclude nations from it, to admit some under favourable and others

(*a*) “Commercium cum Turcis vetitum dicere lege omnes videntur. Et mihi tamen non libet facile discedere a regula certissima Juris Gentium, quod constituit commercia, nec distinguit aliquid de Gentibus.” —*Albericus Gent. Advoc. Hispan. cc. 25, 26.*

*Grotius*, l. ii. c. 2, 5.

*Martens*, l. iv. c. iii. s. 130.

*Klüber*, s. 69.

*Massé, Le Droit commercial dans ses rapports avec de Droit les Gens et le Droit civil*, t. i. l. ii. tit. i. ch. i. (ed. 1874), p. 95.

(*b*) L. ii. c. 2, 13, 5.

under unfavourable conditions, unless, indeed, such original liberty be curtailed by the express provisions of a Treaty.

A nation has the same power of restricting commerce with regard to its distant provinces and colonies. Every colony almost has, at one time or other, been confined to commercial intercourse with its mother country, or to some great privileged company of that country. Every page of the history of colonial dependencies shows with what rigour this monopoly has been exerted by the mother country in time of *peace*, and with what jealousy the forced relaxation of such monopoly in time of *war* by one belligerent in favour of neutrals, has been regarded by the other belligerent. England has steadily denied to the neutral the right of carrying on that commerce with the colonies of the belligerent in time of war from which it had been excluded in time of peace. But this subject belongs to another part of this work.

“The colonial monopoly, that fruitful source of wars” (Mr. Wheaton writes in 1845), “has nearly ceased; and with it the question as to the right of neutrals to enjoy in war “a commerce prohibited in time of peace” (*c*).

The whole *status of Consuls* is considered in a later portion of this work (*d*).

(*c*) *Hist.* pp. 759–60.

(*d*) *Et vide ante*, ch. ii. §. xiii.

## CHAPTER XII.

## RIGHT OF ACQUISITION.

CCXXII. IN the discussion upon the Rights of Territorial Inviolability, the fact of rightful Possession has been assumed (*a*). “Totum autem jus” (the Roman lawyers say) “consistit aut in adquirendo, aut in conservando, aut in minuendo. Aut enim hoc agitur, quemadmodum quid “cujusque fiat; aut quemadmodum quis rem vel jus suum “conservet; aut quomodo alienet aut amittat” (*b*).

Before, however, we enter upon the consideration of the manner in which Acquisitions are made by a State, it seems expedient to offer some observations upon the nature of—

1. Possession (*possessio*); and of
2. Property (*proprietas*), or Dominion (*dominium*).

The Roman Law (*c*) is the repository from which all

(*a*) “Les territoires de l’Europe ont été appropriés à chaque nation à la suite de révolutions successives, dans lesquelles la force, puis la marche lente et logique des événements, ont eu plus d’influence que le droit. L’invasion des peuples du nord dans le monde romain; plus tard, la réunion des différentes petites puissances de la féodalité en Etats plus forts et moins nombreux, sont, dans ce travail, les deux faits principaux. Pendant ce long espace de temps, et depuis, des transformations diverses, des traités nombreux, se sont succédés, et tout finit par constituer le territoire des Etats actuels.

“Il serait inutile de discuter sur la légitimité des premières occupations qui se rencontrent à l’origine de ces Etats.”—*Des Moyens d’acquérir le Domaine international*, par Eugène Ortolan, s. lxi. p. 42.

(*b*) *Dig.* 1. i. t. iii. 41.

(*c*) *Warnkönig, Instit. Juris Rom. Privati*, l. ii. c. i. t. iii., c. ii. t. ii. *Puchta, Pandekten*, Kap. 2.

*Mackeldey, Besond. Theil.* Kap. 1, t. i. .

*Savigny, Besitzrecht.*

*Mühlenbrück, Doctrina Pandect.* l. ii. c. 2.

jurists, whether writing on private or public law, have borrowed their elementary learning upon this point; and it is with truth that a very distinguished modern jurist observes, "Possessionis notio atque indoles, ejus acquisitio vel amissio, accuratius à jurisconsultis Romanis definitæ sunt, ut ea jam non facti solum sed juris quoque esse dicatur" (d).

CCXXIII. The generic term *possession* branches forth into various species (e).

That person is *properly* said to *possess* a thing who both actually and corporally retains it, and who desires and intends at the same time to make it his own.

That person who, having no such desire or intention, by mere corporal act retains a thing, is, only in a gross and inaccurate sense, said to *possess* it.

(d) Warnkönig, *Inst. Juris Romani Privati*, s. 295.

In *The Fama*, 5 C. Rob. Adm. Rep. pp. 114-16, Lord Stowell applies the rules relating to Possession, &c. in the Institutes and Digests to decide a question of International Law.

(e) *Dig.* xli. 2: "De acquirenda vel amittenda possessione."

*Ib.* xliii. 17: "Uti possidetis."

*Inst.* ii. t. vi.: "De usucapione."

"Possessio appellata est, ut et Labio ait, a sedibus, quasi positio, quia naturaliter tenetur ab eo, qui ei insistit; quam Græci *κάρχη* dicunt."—*Dig.* xli. 2, 1.

"Qui jure familiaritatis amici fundum ingreditur, non videtur possidere, quia non eo animo ingressus est, ut possideat, licet corpore in fundo sit."—*Ib.* 41.

"Quod meo nomine possideo, possum et alieno nomine possidere; nec enim muto mihi causam possessionis, sed desino possidere, et alium possessorem ministerio meo facio. Nec idem est possidere, et alieno nomine possidere; nam is possidet, cujus nomine possidetur. Procurator alienæ possessionis præstat ministerium."—*Ib.* 18.

"Justa enim an injusta adversus ceteros possessio sit, in hoc interdicto nihil refert; qualiscunque enim possessor hoc ipso, quod possessor est, plus juris habet, quam ille, qui non possidet."—*Ib.* xliii. 17, 2.

"Creditores missos in possessionem rei servandæ causa interdicto uti possidetis uti non posse; et merito, quia non possident. Idemque et in ceteris omnibus, qui custodiæ causa missi sunt in possessionem, dicendum est."—*Ib.* 17, 8, 8.

"Dejicitur is, qui possidet, sive civiliter, sive naturaliter possideat; nam et naturalis possessio ad hoc interdictum pertinet."—*Ib.* xliii. 16, l. s. 9.



That person who retains a thing in the conviction that he is the rightful *possessor* of it, though he be mistaken, and he not the rightful possessor, may acquire, by the operation of *time*, a legal title to it, and be protected by law in the possession of it (*ad usucapionem possidet*).

. There are, therefore, three *species* of *possession*:

1. Natural possession, or the bare seizing and detaining a thing (*naturalis possessio, sive nuda rei detentio*).

2. Legal possession, by act and intention (*animo et facto, de droit et de fait, possessio proprie sic dicta*) (*f*).

3. Possession by operation of time (*civilis possessio*).

CCXXIV. Dominion (*dominium*) is the fullest right which can be exercised over a thing; *the right of property*, properly so called.

According to the ancient Roman Law, *dominium* could only be acquired by a Roman citizen, and through the medium of certain strict formalities (“*in mancipio habere, ex jure Quiritium dominus*”). But the Prætor, following the dictates of natural equity (*jus gentium*), introduced a doctrine which, without these formalities, secured to the stranger (*peregrinus*), as well as the citizen, a dominion over the thing (*in bonis, bonitarium*) which he had lawfully, and “*jus gentium*” acquired.

Justinian abolished altogether this distinction (*g*) between

(*f*) “Si me in vacuum possessionem fundi Cornelianus miseris, ego putarem me in fundum Sempronianum missum, et in Cornelianum iero, non acquirem possessionem, nisi forte in nomine tantum erraverimus, in corpore consenserimus. Quoniam autem in corpore non consenserimus an a te tamen recedat possessio? quia animo deponere et mutare nos possessionem posse et Celsus et Marcellus scribunt, dubitari potest; et si animo acquiri possessio potest, numquid etiam acquisita est? sed non puto errantem acquirere, ergo nec amittet possessionem qui quodammodo sub conditione recessit de possessione.”—*Dig. xli. 2, 34*.

“Differentia inter dominium et possessionem hæc est, quod dominium nihilo minus ejus manet, qui dominus esse non vult, possessio autem recedit ut quisque constituit nolle possidere. Si quis igitur ea mente possessionem tradidit, ut postea ei restituatur, desinit possidere.”—*Ib. 17, 1*.

(*g*) *Cod. vii. 25*: “De nudo jure Quiritium tollendo.”

*Warnkönig, Instit. J. R. 1. ii. ch. i. t. 3.*

the ancient and the Prætorian Equity, and established universally the *dominium jure gentium*. The law, however, still recognized certain modes of *acquiring* property: these were either according to the *jus gentium* or the *jus civile*.

The principal modes under the *jus gentium* were:

1. Occupation (*occupatio*).
2. Natural increase (*accessio*).
3. Transfer (*traditio*); either
  - { *a.* inter vivos,
  - { *β.* or by testament or succession.

The mode of acquisition under the *jus civile* was,

1. By the effect of a law (*lege*).
2. By a judicial sentence (*adjudicatione*).
3. By the operation of time (*vetustatis auctoritate, usucapione, præscriptione*).

*Dominion* might suffer an *interruption* by the invasion of another person (*usurpatio*).

1. By an overt act on the part of an individual (*naturalis usurpatio*);
2. By an adverse decision of a legal tribunal (*civilis usurpatio*).

As *Dominion* is acquired by the combination of the two elements of *fact* and *intention*, so, by the dissolution of these elements, or by the *contrary fact* and *intention*, it may be lost (*h*) or extinguished (*i*).

The application of these principles of Roman jurisprudence to the system of International Law appears to have been readily made by Grotius and other jurists; and without some acquaintance both with the language and doctrine of the Roman Law upon the subject of Possession and Dominion, it is impossible correctly to understand and justly to appreciate the writings of commentators upon International Law.

(*h*) "*Quemadmodum nulla possessio acquiri nisi animo et corpore potest, ita nulla omittitur nisi in qua utrumque in contrarium actum est.*"—*Dig. xli. 2, 8.*

(*i*) *Vide post.*

It will be well to recite, as a preface to the discussion upon the Rights of Acquisition by a State, the doctrine and language of Bynkershoek: "Postquam Lex certos dominii acquirendi modos præscripsit, hos sequemur" (*k*). From Grotius (*l*) we learn that these modes of Acquisition were:

1. By occupation (*occupatione derelicti*).
2. By Treaty and Convention (*pactionibus*).
3. By Conquest (*victoriæ jure*).

And if Acquisition by Accession and by Prescription be considered as corollaries to Occupation, and all cases of Transfer be held to fall under the category of Treaty and Convention, the enumeration may be considered as sufficiently complete (*m*).

CCXXV. But Acquisition itself is divided into two classes: Original (*acquisitio originaria*) and Derivative (*derivativa, facto hominis vel facto legis*).

Under the former head may be classed Acquisition by Occupation, Accession, and Prescription: under the latter, all Acquisitions by Treaty or Convention, including Transfer (*traditio*), Gift, Sale, Exchange, Inheritance by Testament or Succession, and Acquisitions by Conquest (*n*).

(*k*) *Opera*, iii. 254: "De Dominio Maris."

(*l*) Lib. ii. c. ix. s. 11, p. 338.

(*m*) "Dominiumque rerum ex naturali possessione cepisse, Nerva filius ait, ejusque rei vestigium remanere in his, quæ terra, mari, cœloque capiuntur; nam hæc protinus eorum fieri, qui primi possessionem eorum apprehenderint. Item bello capta, et insula in mari enata, et gemme, lapilli, margaritæ in littoribus inventæ ejus fiunt, qui primus eorum possessionem nactus est."—*Dig.* xli. t. ii. 1, i.

"Sed quemadmodum, cum Theatrum commune sit, recte tamen dici potest ejus esse eum locum quem quisque occupavit: sic in urbe mundove communi non adversatur jus quo minus suum quidque cujusque sit."—*Cicero de Fin.* l. iii. c. 20.

"Sunt autem privata nulla natura: sed aut veteri occupatione, ut qui quondam in vacua venerunt: aut victoria, ut qui bello potiti sunt; aut lege, pactione, conditione, sorte, ex quo fit ut ager Arpinas Arpinatum dicatur: Tusculanus Tusculanorum: similisque est privatarum possessionum descriptio, ex quo quia suum cujusque fit, eorum, quæ natura fuerunt communia, quod cuique obtigit, id quisque teneat: eo si qui sibi plus appetet, violabit jus humanæ societatis."—*De Off.* l. i. c. 7.

(*n*) The effect of Christianity upon the doctrines of possession and

CCXXXVI. With respect to Original Acquisition, we have first to consider under this head the title which a nation acquires by occupation. *Discovery, Use, and Settlement* are all ingredients of that *Occupation* which constitutes a valid title to national acquisitions.

CCXXXVII. *Discovery*, according to the acknowledged practice of nations, whether originally founded upon *Comity* or *Strict Right*, furnishes an *inchoate* title to *possession* in the discoverer. But the discoverer must either, in the first instance, be fortified by the public authority and by a commission from the State of which he is a member, or his discovery must be subsequently (*o*) adopted by that State; otherwise it does not fall, with respect to the protection of the individual, under the cognizance of International Law, except in a limited degree; that is to say, the *individual* has a *natural* title to be undisturbed in the possession of the territory which he occupies, as against all *third Powers*. It will be a question belonging to the Municipal Law of his own country, whether such possessions do not belong to her, and whether he must not hold them under her authority and by her permission. Such would be the case with the possessions of an English subject. But, as far as International

property, or dominion, was as beneficial as it was upon all other doctrines which are conservative of social order and productive of human happiness. Ascribing to God "the world and all that is therein," it nevertheless consecrated the rights of Property; and though for a season the first professors of Christianity had their goods in common, and no private property, yet this was an accidental arrangement, growing out of the particular exigencies of a particular epoch, and ceasing when they ceased. The arrangement, moreover, while it lasted, was voluntary; and even during its continuance, a respect for the strict *rights* of property was carefully inculcated and preserved.—See *Troplong, de l'Influence du Christianisme sur le Droit civil des Romains*, p. 121.

(*o*) "*Ratihabitio* constituit tuum negotium, quod ab initio tuum non erat, sed tui contemplatione gestum."—*Dig.* iii. 5, vi. 9. *De Negotiis gestis*.

"Sed etsi non vero procuratori solvam, ratum autem habet dominus, quod solutum est, liberatio contingit: *rati enim habitio mandato comparatur*."—*Dig.* xlv. 3, xii. 4, *de Solut.*: cf. *Dig.* xliii. 16, i. 14, *de vi et de vi arm.*

Law is concerned, Vattel, following the rules of natural equity incorporated into Roman Jurisprudence, says justly :  
 “ Tous les hommes ont un droit égal aux choses qui ne sont  
 “ point encore tombés dans la propriété de quelqu’un ; et  
 “ ces choses-là appartiennent au premier occupant. Lors  
 “ donc qu’une nation trouve un pays inhabité et sans maître  
 “ elle peut légitimement s’en emparer ; et après qu’elle a  
 “ suffisamment marqué sa volonté à cet égard, un autre ne peut  
 “ l’en dépouiller. C’est ainsi que des navigateurs, allant à la  
 “ découverte, munis d’une commission de leur souverain, et  
 “ rencontrant des îles, ou d’autres terres désertes, en ont pris  
 “ possession au nom de leur nation : et communément ce  
 “ titre a été respecté, pourvu qu’une possession réelle l’ait  
 “ suivi de près ” (p).

CCXXVIII. In the various discussions which took place between the United States and Great Britain with respect to the right of the Oregon Territory, the title resulting from discovery was attempted to be pushed far beyond the limits of this doctrine, even to the extent of maintaining, that the first discovery by an *uncommissioned merchant-ship* gave priority to the claims of America upon these regions. But such a position appears opposed to all authorities upon International Law, and it was steadily denied by Great Britain.

CCXXIX. The *inchoate title*, then, must in the first place be fortified by the previous commission or confirmed by the subsequent Ratification of the State to which the discoverer belongs. So far, according to the practice of nations, strengthened in some degree by the principles of natural Law and the reason of thing, the fact of authorised discovery may be said to found the *right to occupy*.

“ It is to be observed, then ” (Lord Stowell says) “ that  
 “ all corporeal property depends very much upon occupancy.  
 “ With respect to the origin of property, this is the sole foundation : *quod nullius est ratione naturali occupanti conceditur*.

(p) “ Comment une nation s'approprie un pays désert.” — *Vattel*, tom. i. l. i. c. 18, s. 207.

“ So with regard to transfer also, it is universally held, in  
 “ all systems of jurisprudence, that to consummate the right  
 “ of property, a person must unite the *right of the thing with*  
 “ *possession*. A question has indeed been made by some  
 “ writers, whether this necessity proceeds from what they  
 “ call the natural law of nations, or from that which is only  
 “ conventional. *Grotius* seems to consider it as proceeding  
 “ only from civil institutions. *Puffendorf* and *Pothier* go  
 “ farther. All concur, however, in holding it to be a ne-  
 “ cessary principle of jurisprudence, that, to complete the  
 “ right of property, *the right to the thing and the possession*  
 “ *of the thing* itself should be united ; or, according to the  
 “ technical expression, borrowed either from the civil law, or,  
 “ as *Barbeyrac* explains it, from the commentators on the  
 “ Canon Law, that there should be both the *jus in rem* and  
 “ the *jus in re*. This is the general law of property, and  
 “ applies, I conceive, no less to the right of territory than to  
 “ other rights. Even in newly discovered countries, where  
 “ a title is meant to be established *for the first time*, some  
 “ act of possession is usually done and proclaimed as a notifi-  
 “ cation of the fact.

“ In transfer, surely, where the former rights of others are  
 “ to be superseded and extinguished, it cannot be less neces-  
 “ sary that such a change should be indicated by some public  
 “ acts, that all who are deeply interested in the event, as the  
 “ inhabitants of such settlements, may be informed under  
 “ whose dominion and under what laws they are to live.  
 “ This I conceive to be the general propriety of principle on  
 “ the subject, and no less applicable to cases of territory,  
 “ than to property of every other description ” (q).

CCXXX. The next step is to consider what facts con-  
stitute an Occupation : what are the signs and emblems of  
 its having taken place : for it is a clear principle of Inter-  
 national Law, that the title may not be concealed, that the  
*intent* to occupy must be manifested by some *overt* or *external*

acts. The language of the commentators is clear and full upon this point.

“ Simul discimus quomodo res in proprietatem iverint: “ *non animi actu solo*; neque enim scire alii poterant quid “ alii suum esse vellent, ut eo abstinerent; et idem velle “ plures poterant: sed *pacto quodam aut expresso*, ut per “ *divisionem, aut tacito*, ut per occupationem ” (r).

Again:

“ Requiritur autem corporalis quædam possessio ad dominium adipiscendum ” (s).

And again:

“ Præter animum possessionem desidero, sed qualemcunque, quæ probet, me nec corpore desinere possidere ” (t).

These acts, then, by the common consent of nations, must be *use of* and *settlement* in the discovered territories.

CCXXXI. By a Bull promulgated in 1454, Pope Nicholas V. gave to the crown of Portugal the Empire of Guinea, and the power to subdue all the barbarous nations therein, and prohibited the access of all other nations thereto (u). By a Bull promulgated in 1493, Pope Alexander VI. granted to the crown of Spain all lands already, or hereafter discovered, lying to the west and south of the Azores, drawing a line from one pole to the other, a hundred leagues from the west of the Azores. This pontifical decision was subsequently ratified by the *Treaty of Tordesillas* in 1494 (x), and confirmed by Pope Julius in 1506. These Papal grants to, and arbitrations between, Spain and Portugal, as well as the conventions on this subject between the lay Powers themselves, were always utterly disregarded by Great Britain, France, and Holland, though not altogether abandoned by the grantees, till their futility had been demon-

(r) *Grotius*, l. ii. c. ii. 2, s. 5.

(s) *Grotius*, l. ii. c. viii. s. 3.

(t) *Bynkershoek, de Dom. Maris*, c. i.

(u) *Günther*, Kap. i. 6, Kap. ii. 2, s. 10.

(x) *Martens, Rec. t. i. p. 372.*

strated by the result of many sanguinary wars (*y*). Vattel is very clear upon this point: "Mais c'est une question de savoir si une nation peut s'approprier ainsi, par une simple prise de possession, des pays qu'elle n'occupe pas réellement, et s'en réserver de cette manière beaucoup plus qu'elle n'est capable de peupler et de cultiver. Il n'est pas difficile de décider qu'une pareille prétention serait absolument contraire au droit naturel, et opposée aux vues de la nature, qui, destinant toute la terre aux besoins des hommes en général, ne donne à chaque peuple le droit de s'approprier un pays que pour les usages qu'elle en tire, et non pour empêcher que d'autres en profitent. Le droit des gens ne reconnaîtra donc la *propriété* et la *souveraineté* d'une nation que sur les *pays vides* qu'elle aura occupés *réellement et de fait*, dans lesquels elle aura formé un établissement, ou dont elle tirera un usage actuel (*z*). En effet, lorsque des navigateurs ont rencontré des pays déserts, dans lesquels ceux des autres nations avaient dressé en passant quelque monument, pour marquer leur prise de possession, ils ne se sont pas plus mis en peine de cette vaine cérémonie que de la disposition des papes, qui partagèrent une grande partie du monde entre les couronnes de Castille et de Portugal" (*a*). Indeed, writers on International Law agree that Use and Settlement, or, in other words, continuous use, are indispensable elements of occupation properly so called. The mere erection of crosses, landmarks, and inscriptions is ineffectual for acquiring or maintaining an exclusive title to a country of which no real use is made (*b*).

(*y*) Even in modern times Spain has claimed the north-western coasts of America upon the sole ground of having first discovered them.

(*z*) "Quam est hic fortunatus putandus, cui soli vere licet omnia, non Quiritium, sed *sapientium jure*, pro suis vindicare! nec civili nexo, sed *communi lege naturæ* quæ vetat ullam rem esse ejusquam, nisi ejus qui tractare et uti sciat."—Cicero, *de Republica*, l. i. c. 17.

(*a*) L. i. c. xviii. s. 208.

(*b*) Klüber, s. 126.

Wheaton, *Elém.* i. c. 4.



CCXXXII. But when occupation by Use and Settlement has followed upon discovery, it is a clear proposition of Law, that there exists that corporeal possession (*corporalis quædam possessio* (c), *detentio corporalis* (d)) which confers an exclusive title upon the occupant, and the *Dominium eminens*, as Jurists speak, upon the country whose agent he is.

CCXXXIII. Next arises the difficult question, as to how much territory is occupied by such a settlement? to what extent must the corporeal possession go, in order to give a title to more than is actually inhabited? (e)—what, in fact, is the International doctrine of *contiguity* (*ratio vicinitatis*)?

CCXXXIV. Vattel says, that when several nations possess and occupy a desert (f) and unoccupied land, they should agree upon an equitable partition between themselves; if they cannot do this, each nation has a right of empire and domain in the parts where they have first made their settlements. This remark, however, does not afford much assistance towards a solution of the difficulty (g).

In truth, it is impossible to do more than lay down a broad general rule, aided in some degree by the practice of

(c) *Grotius*, l. ii. c. viii. s. 3.

(d) "Cultura utique et cura agri possessionem quam maxime indicat. Neque enim desidero, vel desideravi unquam, ut tunc demum videatur quis possidere, si res mobiles, ad instar testudinum, dorso ferat suo, vel rebus immobilibus incubet corpore, ut gallinæ solent incubare ovis. Præter animum possessionem desidero, sed qualemcunque, quæ probet, me nec corpore desiisse possidere. . . . Igitur quicquid dicat Titius, quicquid Mævius, ex possessione jure naturali et gentium suspenditur dominium, nisi pacta dominium, citra possessionem, defendant, ut defendit jus cujusque civitatis proprium."—*Bynkershoek*, Op. t. vi., *De Dominio Maris*, pp. 360, 361.

(e) "Et adipiscimur possessionem corpore et animo, neque per se animo, aut per se corpore. Quod autem diximus et corpore et animo acquirere nos debere possessionem, non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet, sed sufficit quamlibet partem ejus fundi introire, dum hac mente et cogitatione sit, uti totum fundum usque ad terminum velit possidere."—*Dig.* xli. t. ii. 3, 1.

(f) *Ibid.* 7, 5.

(g) *Vattel*, l. ii. s. 95.

nations, to be applied to each case as it may arise, and modified in some degree by any particular circumstance which may belong to it.

CCXXXV. Some natural circumstances, however, seem to distinguish the rule in its application to a continent or an island.

With respect to a continent.—The occupation of a portion of the sea-coast gives a right to the usual protecting limit at sea, which is holden to exist in all old countries. The right of dominion would extend from the portion of the coast actually and duly occupied inland, so far as the country was uninhabited, and so far as it might fairly be considered to have the occupied *sea-board* for its natural outlet to other nations.

CCXXXVI. A remarkable instance of an International dispute, arising out of the doctrine of contiguity, is afforded by the discussion, which arose upon the interpretation of the language of the Treaty of Utrecht relating to the cessions of France to England. The expressions were as follows:

“ Dominus Rex Christianissimus eodem quo pacis præ-  
 “ sentis Ratihabitiones commutabuntur die, Dominae Reginae  
 “ Magnae Britanniae litteras, tabulasve solennes et authen-  
 “ ticas tradendas curabit, quarum vigore, insulam Sancti  
 “ *Christophori*, per subditos Britannicos sigillatim dehinc  
 “ possidendam; *Novam Scotiam quoque, sive Acadiam totam,*  
 “ *limitibus suis antiquis comprehensam, ut et Portus Regii*  
 “ *urbem, nunc Annapolin regium dictam, caeteraque omnia in*  
 “ *istis regionibus quæ ab iisdem terris et insulis pendent, una cum*  
 “ earundum insularum, terrarum, et locorum dominio, proprie-  
 “ tate, possessione, et quocunque jure sive per pacta, sive alio  
 “ modo quæsito, quod Rex Christianissimus, corona Galliae,  
 “ aut ejusdem subditi quicunque ad dictas insulas, terras et  
 “ loca, eorumque incolas, hactenus habuerunt, Reginae Magnae  
 “ Britanniae ejusdemque coronae in perpetuum cedi constabit  
 “ et transferri, prout eadem omnia nunc cedit ac transfert  
 “ Rex Christianissimus; idque tam amplis modo et forma,  
 “ ut Regis Christianissimi subditis in dictis maribus, sinibus,

“ aliisque locis ad littora Novæ Scotiæ, ea nempe quæ Eurum  
 “ respiciunt, intra triginta leucas, incipiendo ab insula, vulgo  
 “ *Sablé* dicta, eaque inclusa et Africum versus pergendo,  
 “ omni piscatura in posterum interdicatur ” (*h*).

The words in Italics led to a variety of demands on the part of Great Britain, with respect to the territories included under these words. The French replied: “ Les mots de  
 “ *limitibus* et de *comprehensam* n’ont jamais été placés nulle-  
 “ part pour donner de l’extension. La phrase (*ut et*) que  
 “ citent les Commissaires anglois ne donne aucune extension  
 “ à la cession, et ne peut pas opérer sans le dire, et par une  
 “ vertu secrète, que ce qui n’étoit pas Acadie avant le traité  
 “ soit devenu Acadie après le traité; ni que les pays *circon-*  
 “ *voisins*, ou les *confins* de l’Acadie, en soient devenus des  
 “ dépendances; ni que l’accessoire soit six ou huit fois plus  
 “ considérable que le principal. Jamais on ne prouvera, que  
 “ par les *appartenances* et les dépendances d’un pays, on  
 “ doive entendre ceux qui en sont voisins. Proximité et  
 “ dépendance sont deux idées différentes, distinctes; leur con-  
 “ fusion entraîneroit celle des limites de tous les Etats ” (*i*).  
 The dissensions on this subject were the principal cause of the war which broke out in 1756. A similar quarrel arose with respect to the provinces claimed from Germany by the Chambers of Reunion of France. By the following words in the 12th Article of the Peace of Münster (1648)—  
 “ *Supremum dominium, jura superioritatis aliaque omnia in*  
 “ *Episcopatus Metensem, Tallensem et Viradunensem, ur-*  
 “ *besque cognomines eorumque Episcopatum districtus,*”  
 &c., it was contended that the throne of France was exempted from various feudal liabilities to the German Empire, to which these bishoprics had been previously subject, but, as Günther (*j*) remarks, without any foundation in justice.

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(*h*) *Treaty of Utrecht, 1713*:—Schmauss, *Corpus Jur. Gent. Academ.* vol. ii. p. 1332.

(*i*) *Mémoires des Commissaires de S. M. Très-Christienne, etc.* tom. i. R. 1, pp. 54, 62, 183.

(*j*) *Europ. Völkerrecht*, vol. ii. p. 180. See also *Bolingbroke's Letters on the Study and Use of History*, l. vii. p. 273 (ed. 1752).

The United States of America, during the pendency of the negotiations with England, with respect to the Oregon boundary, asserted "that a nation discovering a country, by entering the mouth of its principal river at the sea-coast, must necessarily be allowed to claim and hold as great an extent of the interior country as was described by the course of such principal river and its tributary streams" (*k*).

But this proposition was strenuously denied by Great Britain upon various grounds:—1. That no such right accrued at all to mere discovery. 2. Not to discovery by a private individual. Great Britain "was yet to be informed" (she said) "under what principles or usage, among the nations of Europe, his having first entered or discovered the mouth of the River Columbia, admitting this to have been the fact, was to carry after it such a portion of the interior country as was alleged. Great Britain entered her dissent from such a claim; and least of all did she admit that the circumstance of a merchant vessel of the United States having penetrated the coast of that continent at Columbia River, was to be taken to extend a claim in favour of the United States along the same coast, both above and below that river, over latitudes that had been previously discovered and explored by Great Britain herself, in expeditions fitted out under the authority and with the resources of the nation" (*l*).

CCXXXVII. If the circumstances had been these, viz. that an actual settlement had been grafted upon a discovery made by an authorised public officer of a nation at the mouth of a river, the law would not have been unreasonably applied.

There appears to be no variance in the opinions of writers upon International Law as to this point. They all agree that the Right of Occupation incident to a settlement, such as has been described, extends over all territory actually and *bona fide* occupied, over all that is essential to the real use

(*k*) *State Papers*, vol. iii. p. 506. *Twiss, Oregon Question Examined*.  
 (*l*) *State Papers*, vol. xiii. p. 509.

of the settlers, although the use be only inchoate, and not fully developed; over all, in fact, that is necessary for the integrity and security of the possession, such necessity being measured by the principle already applied to the parts of the sea adjacent to the coasts, namely, "*ibi finitur imperium ubi finitur armorum vis.*" The application of the principle to a territorial boundary is, of course, dependent in each case upon details of the particular topography.

Martens, discussing "*jusqu'où s'étend l'occupation,*" writes with as much precision and clearness upon the point as the subject will admit of. "*Une nation qui occupe un district doit être censée avoir occupé toutes les parties vacantes qui le composent; sa propriété s'étend même sur les places qu'elle laisse incultes, et sur celles dont elle permet l'usage à tous. Les limites de son territoire sont ou naturelles (telles que la mer, les rivières, les eaux, les montagnes, les forêts) ou artificielles (telles que des barrières, des bornes, des poteaux, etc.) Les montagnes, les forêts, les bruyères, etc., qui séparent le territoire de deux nations, sont censés appartenir à chacune des deux jusqu'à la ligne qui forme le milieu, à moins qu'on ne soit convenu de régler différemment les limites, ou de les neutraliser. A défaut des limites certaines, le droit d'une nation d'exclure des nations étrangères des terres ou îles voisines ne s'étend pas au-delà du district qu'elle cultive ou duquel du moins elle peut prouver l'occupation; à moins que, de part et d'autre, l'on ne soit convenu de ne pas occuper certains districts, îles, etc., en les déclarant neutres*" (m).

CCXXXVIII. This middle distance mentioned by Martens appears, in cases where there is no sea-coast boundary, to be recognized in practice.

In the negotiations between Spain and the United States of America respecting the western boundary of Louisiana, the latter country laid down with accuracy and clearness

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(m) *Martens, Droit des Gens*, l. ii. c. 1, s. 38.

certain propositions of law upon this subject, which fortify the opinion advanced in the foregoing paragraphs. "The principles" (America said on this occasion) "which are applicable to the case, are such as are dictated by reason, and have been adopted in practice by European Powers in the discoveries and acquisitions which they have respectively made in the New World. They are few, simple, intelligible, and, at the same time, founded in strict justice. The first of these is, that when any European nation takes possession of any extent of sea-coast, that possession is understood as extending into the interior country, to the sources of the rivers emptying within that coast, to all their branches, and the country they cover, and to give it a right, in exclusion of all other nations, to the same. (See *Mémoire de l'Amérique*, p. 116.) It is evident that some rule or principle must govern the rights of European Powers in regard to each other in all such cases: and it is certain that none can be adopted, in those to which it applies, more reasonable or just than the present one. Many weighty considerations show the propriety of it. Nature seems to have destined a range of territory so described for the same society; to have connected its several parts together by the ties of a common interest, and to have detached them from others. If this principle is departed from, it must be by attaching to such discovery and possession a more enlarged or contracted scope of acquisition; but a slight attention to the subject will demonstrate the absurdity of either. The latter would be to restrict the rights of an European Power, who discovered and took possession of a new country, to the spot on which its troops or settlements rested: a doctrine which has been totally disclaimed by all the Powers who made discoveries and acquired possessions in America. The other extreme would be equally improper; that is, that the nation who made such discovery should, in all cases, be entitled to the whole of the territory so discovered. In the case of an island, whose

“ extent was seen, which might be soon sailed round and  
 “ preserved by a few forts, it may apply with justice: but  
 “ in that of a continent it would be absolutely absurd.  
 “ Accordingly, we find that this opposite extreme has been  
 “ equally disclaimed and disavowed by the doctrine and  
 “ practice of European nations. The great continent of  
 “ America, north and south, was never claimed or held by  
 “ any one European nation, nor was either great section of  
 “ it. Their pretensions have been always bounded by more  
 “ moderate and rational principles. The one laid down has  
 “ obtained general assent.

“ This principle was completely established in the con-  
 “ troversy which produced the war of 1755. Great Britain  
 “ contended that she had a right, founded on the discovery  
 “ and possession of such territory, to define its boundaries  
 “ by given latitudes in grants to individuals, retaining the  
 “ sovereignty to herself, from sea to sea. This pretension  
 “ on her part was opposed by France and Spain, and it was  
 “ finally abandoned by Great Britain in the Treaty of 1763,  
 “ which established the Mississippi as the western boundary  
 “ of her possessions. It was opposed by France and Spain,  
 “ on the principle here insisted on, which of course gives it  
 “ the highest possible sanction in the present case.

“ The second is, that whenever one European nation  
 “ makes a discovery and takes possession of any portion of  
 “ that continent (*n*), and another afterwards does the same at  
 “ some distance from it, where the boundary between them  
 “ is not determined by the principle above mentioned, the  
 “ middle distance becomes such of course. The justice and  
 “ propriety of this rule is too obvious to require illustration.

“ A third rule is, that whenever any European nation has  
 “ ~~the~~ acquired a right to any portion of territory on that  
 “ continent, that right can never be diminished or affected  
 “ by any other Power, by virtue of purchases made, by grants

(*n*) As to the character of the early acquisitions made by the East India Company, see *Speech on Motion relative to the Speech from the Throne*, *Burke's Works*, vol. iv. p. 161 and note.

“or conquests of the natives within the limits thereof. It  
“is believed that this principle has been admitted (o) and  
“acted on invariably since the discovery of America, in  
“respect to their possessions there, by all the European  
“Powers. It is particularly illustrated by the stipulations  
“of their most important treaties concerning those posses-  
“sions and the practice under them, viz. the Treaty of  
“Utrecht in 1713, and that of Paris in 1763. In conformity  
“with the 10th Article of the first-mentioned Treaty, the  
“boundary between Canada and Louisiana on the one side,  
“and the Hudson Bay and North-western Companies on  
“the other, was established by Commissaries, by a line to  
“commence at a Cape or Promontory on the Ocean in  
“58° 30' north latitude, to run thence south-westwardly to  
“latitude 49° north from the Equator, and along that line  
“indefinitely westward. Since that time, no attempt has  
“been made to extend the limits of Louisiana or Canada to  
“the north of that line or of those Companies to the south  
“of it, by purchase, conquest, or grants from the Indians.  
“By the Treaty of Paris, 1763, the boundary between the  
“present United States and Florida and Louisiana was  
“established by a line to run through the middle of the  
“Mississippi from its source to the river Iberville, and  
“through that river to the Ocean. Since that time, no  
“attempts have been made, by those States since their in-  
“dependence, or by Great Britain before it, to extend their  
“possessions westward of that line, or of Spain to extend  
“hers eastward of it, by virtue of such acquisitions made  
“of the Indians. These facts prove incontestably that this  
“principle is not only just in itself, but that it has been  
“invariably observed by all the Powers holding possessions  
“in America, in all questions to which it applies relative to  
“those possessions” (p).

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(o) In the case of *Johnson v. Mackintosh*, 8 *Wheaton Rep.* p. 543, decided by the Supreme Court of the U.S., A.D. 1823, the practice and law on this subject are fully considered.

(p) *State Papers*, vol. v. pp. 327-329.



CCXXXIX. Here it should be remarked that in those instances in which (*q*) rivers form the boundary between two States, all nations appear to have acquiesced in the wisdom and justice of the rules laid down in the Roman Law upon this subject.

CCXL. The law of property as incident to Neighbourhood (*vicinitas*) or Contiguity was discussed under many and various heads (*r*) in that system of jurisprudence. But it was especially treated of in the following cases relating to *fluvial Accessions*.

Proceeding upon the principle that the river itself was "*communis usus*," but that the bed of it was so much land belonging to the proprietors of the banks, though the property was in abeyance while covered with water, and that the mid-channel was the line of demarcation between the neighbours, it decided—

1. That if an island emerged in the stream, the property of it accrued to the owner of the nearest bank.

2. If it emerged in the middle of the stream, the property was divided between the *arcifinii*, as the opposite proprietors were called.

3. If the channel of the river was left dry (*alveus derelictus*) it was also equally apportioned between the owners of the banks.

4. If the river abandoned its new channel, a difference of opinion existed whether that channel also accrued in equal moieties to the owners of the banks, or whether it reverted to the dominion of the ancient proprietor (*cujus antea fuit*). The former opinion was given by *Cuius*, the latter by *Pomponius*, and both were incorporated in the *Digest*; though the former only appeared in the *Institutes*, with an intimation that it was doubtful Law (*sed vix est ut id obtineat*), as

(*q*) *Vattel*, i. c. xxii. s. 286: *Des Fleuves, des Rivières, et des Lacs*.

(*r*) *Dig.* xliii. t. xii. l. i. s. 7. *De Fluminibus, &c.*

*Instit.* l. ii. t. i. ss. 20, 21. *De Rerum divis. &c.*

*Cod.* vii. 41. *De Alluvionibus*.

*Dig.* xli. t. i. l. 7, l. 20, l. 30, l. 53, l. 65. *De Acquir. rerum domin.*

indeed it appears to be, though much might depend upon the length of time during which the new channel had been occupied.

5. All alluvial deposits belonged *jure gentium*, that is, by natural law, to the owner of the bank to which they adhered.

6. If the violence of the stream (*vis fluminis*) had detached a portion of the soil from one bank and carried it over to the other side, the Law decided, that if it became firmly imbedded so as to be irremovable, it belonged to the owner of that side, otherwise it might be vindicated by its old proprietor.

CCXLI. Modern times have furnished us with a very important practical commentary upon this ancient rule of Public Law.

In the case of the *Anna*, captured by a British privateer and brought into the High Court of Admiralty for adjudication, Lord Stowell made the following observations:—  
 “When the ship was brought into this country, a claim was  
 “given of a grave nature, alleging a violation of the terri-  
 “tory of the United States of America. This great lead-  
 “ing fact has very properly been made a matter of much  
 “discussion, and charts have been laid before the Court to  
 “show the place of capture, though with different represen-  
 “tations from the adverse parties. The capture was made,  
 “it seems, at the mouth of the River Mississippi, and, as it  
 “is contended in the claim, within the boundaries of the  
 “United States. We all know that the rule of Law on  
 “this subject is, *terræ dominium finitur, ubi finitur armorum*  
 “*vis*; and since the introduction of firearms, that distance  
 “has usually been recognized to be about three miles from  
 “shore. But it so happens in this case, that a question  
 “arises as to what is to be deemed the shore, since there are  
 “a number of little mud-islands composed of earth and  
 “trees drifted down by the river, which form a kind of  
 “portico to the main land. It is contended that these are  
 “not to be considered as any part of the territory of  
 “America, that they are a sort of ‘*no man’s land*,’ not of

“ consistency enough to support the purposes of life, unin-  
 “ habited, and resorted to only for shooting and taking  
 “ birds’ nests. It is argued that the line of territory is to  
 “ be taken from the Balise, which is a fort raised on made  
 “ land by the former Spanish possessors. I am of a diffe-  
 “ rent opinion; I think that the protection of territory is to  
 “ be reckoned from these islands; and that they are the  
 “ natural appendages of the coast on which they border,  
 “ and from which, indeed, they are formed. Their elements  
 “ are derived immediately from the territory, and on the  
 “ principle of alluvium and increment, on which so much is  
 “ to be found in the books of Law, *quod vis fluminis de tuo*  
 “ *prædio detraxerit, et vicino prædio attulerit, palam tuum*  
 “ *remanet* (s), even if it had been carried over to an adjoin-  
 “ ing territory. Consider what the consequence would be if  
 “ lands of this description were not considered as appendant  
 “ to the main land, and as comprised within the bounds of  
 “ territory. If they do not belong to the United States of  
 “ America, any other Power might occupy them; they might  
 “ be embanked and fortified. What a thorn would this be  
 “ in the side of America! It is physically possible, at least,  
 “ that they might be so occupied by European nations, and  
 “ then the command of the river would be no longer in  
 “ America, but in such settlements. The possibility of such  
 “ a consequence is enough to expose the fallacy of any  
 “ arguments that are adduced to show that these islands are  
 “ not to be considered as part of the territory of America.  
 “ Whether they are composed of earth or solid rock, will  
 “ not vary the right of dominion; for the right of dominion  
 “ does not depend upon the texture of the soil. I am of  
 “ opinion that the right of territory is to be reckoned from  
 “ those islands ”(t).

It was not without reason that the ancients worshipped  
 the God *Terminus* on account of the fidelity with which he  
 preserved the Rights of Property between nations as well as

(s) *Inst.* l. ii. tit. i. s. 21.

(t) *The Anna*, 5 C. Rob. Adm. Rep. p. 373.

individuals, and because they saw that if his jurisdiction were to cease, quarrels would be endless.

Tu populos urbesque et regna ingentia finis (u).

The River and the Mountain are not necessary landmarks (x); there may be, and often are, artificial landmarks wholly irrespective of any natural boundaries. In these cases, the change in the course of the river has no effect upon the property. We know indeed, alas! by recent experience, that the phrases "natural boundaries" and "rectification of frontiers" have been used by powerful military States to cover unjust spoliation of the property of their weaker neighbour. But turning from these acts of violence and wrong, it is to be observed that in countries which have no other limit than a river, there is a distinction to be taken, according to Grotius, between a change made in the course of a river by imperceptible degrees, and a change made all at once. In the former case, the river, being the same, continues to be the boundary; in the latter, the river leaving its old channel all at once, it is no longer reckoned the same: the old bed of the river continues to be the boundary.

CCXLII. The nature of Occupation is not confined to any one class or description; it must be a *beneficial use and occupation* (*le travail d'appropriation* (y)); but it may be

- (u) "Conveniunt, celebrantque dapés vicinia supplex,  
Et cantant laudes, Termine sancte, tuas.  
Tu populos urbesque et regna ingentia finis;  
Omnis erit sine te litigiosus ager.  
Nulla tibi ambitio est: nullo corrumpereis auro,  
Legitima servas credita rura fide."

*Ovid, Fasti, ii. 655.*

(x) *Grotius, l. ii. c. iii. ss. 16, 17.*

*Heffter, s. 96: Grenzen der Staatsgebiete.*

*Traité des Limites entre le Brésil et la République orientale de l'Uruguay, Annuaire des Deux Mondes, 1851-2. Appendix, p. 985.*

*Klüber, s. 133.*

*Günther, Kap. ii. 4.*

*Rutherford, b. ii. c. ix. vii. p. 491 (ed. Baltimore, 1832).*

(y) *Eug. Ortolan, Dom. intern. p. 37.*

by a settlement for the purpose of prosecuting a particular trade, such as a fishery, or for working mines, or pastoral occupations, as well as agriculture, though Bynkershoek is correct in saying, "*cultura utique et cura agri possessionem quam maxime indicat*" (z).

Vattel justly maintains that the pastoral occupation of the Arabs entitled them to the exclusive possession of the regions which they inhabit. "Si les Arabes pasteurs voulaient cultiver soigneusement la terre, un moindre espace pourrait leur suffire. Cependant, aucune autre nation n'est en droit de les resserrer, à moins qu'elle ne manquât absolument de terre; car enfin ils *possèdent* leur pays; ils s'en servent à leur manière; ils en tirent un usage convenable à leur genre de vie; sur lequel ils ne reçoivent la loi de personne" (a).

It has been truly observed that, "agreeably to this rule, the North American Indians would have been entitled to have excluded the British fur-traders from their hunting grounds; and not having done so, the latter must be considered as having been admitted to a joint occupation of the territory, and thus to have become invested with a similar right of excluding strangers from such portions of the country as their own industrial operations pervade" (b.)

CCXLIII. A similar settlement was founded by the British and Russian Fur Companies in North America.

The chief portion of the Oregon Territory is valuable solely for the fur-bearing animals which it produces. Various establishments in different parts of this territory organized a system for securing the preservation of these animals, and exercised for these purposes a control over the native population. This was rightly contended to be the only exercise

(z) *De Dominio Maris*, vol. vi. c. i. p. 360.

(a) *Vattel*, l. ii. s. 97.

(b) *The Oregon Question*, a pamphlet by Edward J. Wallace, 1846, p. 25.

of *proprietary right* of which these particular regions at that time were susceptible; and to mark that a *beneficial use* was made of the whole territory by the occupants.

CCXLIV. It should be mentioned that the practice of nations in both hemispheres is to acknowledge, in favour of any civilized nation making a settlement in an uncivilized country, a right of pre-emption of the *contiguous* territory from the native inhabitants as against any other civilized nation (c). It was a right claimed by Great Britain with respect to her Australasian settlements, especially New Zealand; and by the United States of America with respect to the Indians in their back States (d).

CCXLV. The Bulls of Alexander VI. reserved from the grant to Spain all lands previously acquired by any *Christian* nation. It is much to be lamented, both for the influence of Christianity and the honour of Europe, that the regard, which has been shown of late years for the rights of *natives* in those countries, into which the over-flowings of European population have been poured, was not exhibited at an earlier period.

It may indeed be justly said, that the Earth was intended by God to supply the wants of the general family of mankind, and that the cultivation of the soil is an obligation imposed upon man; and it seems a fair conclusion from these premisses, that when the population of a country exceeds the means of support which that country can afford, they have a right, not only to occupy uninhabited districts (which, indeed, they would be entitled to do irrespectively of this emergency), but also to make settlements in countries capable of supporting large numbers by cultivation, but at present wandered over by nomad or hunting tribes. Vattel goes further, and gives a right to expel by force the inhabitants of a country, who, refusing to cultivate the soil, live entirely by rapine on their neighbours; and such people, like the

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(c) *Wallace's Pamphlet*, p. 28.

(d) *Twiss, Oregon*, p. 106.

modern Buccaneers in the Chinese Seas, may lawfully be treated as pirates.

CCXLVI. To return, however, to the previous question. Vattel says: "Ceux qui retiennent encore ce genre de vie  
"oisif, usurpent plus de terrain qu'ils n'en auraient besoin  
"avec un travail honnête, et ils ne peuvent se plaindre, si  
"d'autres nations, plus laborieuses et trop resserrées, vien-  
"nent en occuper une partie. Ainsi, tandis que la conquête  
"des empires policés du *Pérou* et de *Mexique* a été une  
"usurpation criante, l'établissement de plusieurs colonies  
"dans le continent de *l'Amérique septentrionale* pouvait, en  
"se contenant dans de justes bornes, n'avoir rien que de  
"très-légitime. Les peuples de ces vastes contrées les  
"parcouraient plutôt qu'ils ne les habitaient" (e).

And again: "On ne s'écarte donc point des vues de la  
"nature, en resserrant les sauvages dans des bornes plus  
"étroites. Cependant, on ne peut que louer la modération  
"des *Puritains* anglais, qui les premiers s'établirent dans  
"la Nouvelle-Angleterre. Quoique munis d'une charte de  
"leur souverain, ils achetèrent des sauvages le terrain qu'ils  
"voulaien occupen. Ce louable exemple fut suivi par  
"*Guillaume Penn* et la colonie de Quackers, qu'il conduisit  
"dans la Pennsylvanie" (f).

Though it is to be hoped that this comparison in favour of Great Britain is, in great measure, founded in justice, it cannot be denied that she is not without her share in the guilt of forcibly dispossessing and exterminating unoffending inhabitants of countries with whom she had no just cause of

(e) *Vattel*, t. i. l. i. c. vii. s. 81.

(f) *Ib.* c. xviii. s. 200.

"He that brings wealth home is seldom interrogated by what means it was obtained. This, however, is one of those modes of corruption with which mankind ought always to struggle, and which they may in time hope to overcome. There is reason to expect that as the world is more enlightened, policy and morality will at last be reconciled, and that nations will learn not to do what they would not suffer."—*Thoughts on the Transactions relating to the Falkland Islands, 1771*, by Dr. Johnson, *Works*, vol. xii. pp. 123, 124.

war. "The patent granted by King Henry VII. of England "to John Cabot and his sons authorized them 'to seek out "and discover all islands, regions, and provinces whatsoever "that may belong to heathens and infidels,' and 'to subdue, "occupy, and possess these territories, as his vassals and "lieutenants.' In the same manner the grant from Queen "Elizabeth to Sir Humphrey Gilbert empowers him 'to "discover such remote heathen and barbarous lands, "countries, and territories, not actually possessed of any "Christian prince or people, and to hold, occupy, and "enjoy the same, with all their commodities, jurisdictions, "and royalties'" (g). Most truly does Mr. Wheaton say, "There was one thing in which they" (i.e. the European nations) "all agreed, that of almost entirely disregarding "the right of the native inhabitants of these regions" (h).

CCXLVII. Nor can a better excuse for such conduct be alleged than the detestable doctrine, which it is melancholy to find maintained by some modern writers, viz. that International Law is confined in its application to European territories. A denial of this doctrine formed part of an earlier chapter of this work (i), and need not be more particularly referred to in this place.

It should be remembered that Penn, though formally commissioned by his sovereign, acquired his territory by treaty and convention with the aboriginal inhabitants.

CCXLVIII. It may therefore be considered as a maxim of International Law, that Discovery alone, though accompanied by the erection of some symbol of sovereignty, if unaccompanied by acts of a *de facto* possession, does not constitute a national acquisition.

A different opinion appears, indeed, to have been entertained by the officers of Great Britain in 1774, at the period of her temporary abandonment of the Falkland Islands.

(g) *Wheaton's Elements* (English ed.), pp. 209, 210.

(h) *Ibid.*

(i) Pt. i. ch. iii.



But the doctrine in the text may now be said to be very generally established (j).

CCXLIX. The practice of nations supports the doctrine of *beneficial use and occupation* (k). In a dispute which arose between Great Britain and Spain relative to the subject of Nootka Sound (l), Spain claimed a large portion of the north-western coast of America upon the ground of priority of discovery and of long possession, confirmed by the 8th Article (m) of the Treaty of Utrecht (1713). The British Government resisted their claim upon the ground that the Earth was the heritage of all mankind, and that it was competent to each State, through the means of occupation and cultivation, to appropriate a portion of it. The dispute was ended by a convention between the two Powers, in which it was agreed, that it was lawful for the respective subjects of each to navigate freely the Pacific and the Southern Seas, to land upon the coasts of these seas, to traffic with the natives, and to form settlements; subject to certain conditions specified in the convention.

CCL. The claims of the United States of North America

(j) *Eug. Ortolan, Dom. intern.* p. 49, n. 2; *Moser's Versuch*, Buch 5, p. 541.

*Wenck*, t. iii. p. 815.

*Johnson's Works*, vol. xii.: *Thoughts on the Falkland Islands*.

*Martens, Rec.* t. ii. p. 1.

*Inscription que le Lieutenant Clayton, commandant le fort Egmont, fit graver sur une plaque de plomb attachée au fort Egmont pour conserver les droits de la couronne d'Angleterre sur les Isles de Falckland lorsque les Anglais quittèrent ledit fort le 22 mai 1774 :*

"Qu'il soit notoire à toutes les nations que les Isles de Falckland, ainsi que ce Fort, les Magasins, Quais, Hayres, Bayes et Oriques qui en dépendent, appartiennent de droit uniquement à sa Très-Sacrée Majesté George III., Roi de la Grande-Bretagne, de France, et d'Irlande, Défenseur de la Foi, etc. En foi de quoi cette Plaque a été fixée, et les Pavillons de S. M. Britannique déployés et arborés, comme une marque de possession, par Samuel Guillaume Clayton, Officier commandant aux Isles de Falckland, le 22 mai 1774."

(k) *Eug. Ortolan, Dom. int.* p. 48.

(l) *Wheaton, Elém.* t. i. p. 162.

(m) *Schmauss*, ii. 1422. The words of the Article are very vague.

upon the Oregon Territory were, as has been shown, chiefly founded upon priority of discovery, both by their own subjects, and by the Spaniards, whose pretensions they had by the Treaty of 1819 inherited. The British Government denied both the fact of prior discovery, and the enormous inference sought to be drawn from it; and most clearly asserted at the same time the right of other nations to occupy vacant portions of the earth wheresoever they might be. The temporary arrangements of 1818 and 1827 were merged in the definitive Treaty of Washington in 1846 (n).

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(n) "*Article I.*—From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing Treaties and Conventions between Great Britain and the United States terminates, the line of boundary between the territories of her Britannic Majesty and those of the United States shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel, and of Fuca's Straits to the Pacific Ocean; provided, however, that the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of the north latitude, remain free and open to both parties.

"*Article II.*—From the point at which the forty-ninth parallel of north latitude shall be found to intersect the great northern branch of the Columbia River, the navigation of the said branch shall be free and open to the Hudson's Bay Company, and to all British subjects trading with the same, to the point where the said branch meets the main stream of the Columbia, and thence down the said main stream to the ocean, with free access into and through the said river or rivers; it being understood that all the usual portorage along the line just described shall be in like manner free and open.

"In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this article shall be construed as preventing or intending to prevent the Government of the United States from making any regulations respecting the navigation of the said river or rivers not inconsistent with the present Treaty.

"*Article III.*—In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this Treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected.

"*Article IV.*—The farms, lands, and other property of every description

belonging to the Puget's Sound Agricultural Company, on the north side of the Columbia River, shall be confined to the said Company. In case, however, the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States Government should signify a desire to obtain possession of the whole or of any part thereof, the property so required shall be transferred to the said Government at a proper valuation, to be agreed upon between the parties."—*Ann. Reg.* 1846, pp. 453, 454.

Under this Treaty a dispute arose between the two States as to the ownership of the island of San Juan. The matter was one of those dealt with by the Treaty of Washington of 1871, and was, by one of its provisions, submitted to the arbitration of the German Emperor. His award dated October 21, 1872, gave it to the United States.—*Vide infra*, vol. iii. chap. i. s. 3.

## CHAPTER XIII.

### PRESCRIPTION.

CCLI. The second mode of Original Acquisition is effected by the operation of time, by what English and French jurists term *Prescription* (*a*). In order to arrive at any solution of this difficult question which may be at all satisfactory, it is necessary to make some observations upon the place which Prescription occupies in the systems both of Private and Public Law, as introductory to the consideration of the place occupied by the same doctrine in the system of International Jurisprudence.

First, as to Private Law. In all systems of *private* jurisprudence, the lapse of time has a considerable bearing upon the question of property (*b*). There is, according to all such systems, a period when a *de facto* becomes a *de jure* ownership, when possession becomes property. The nature of man, the reason of the thing, the very existence of society, demand that such should be the case. The Roman Law does but give expression to this paramount necessity in the maxim, "*Vetus-*

(a) *Grotius*, l. ii. c. iv.

*Puffendorf*, *Jus. Nat. et Gent.* l. iv. c. xii.

*Wolff*, *Jus. Nat.* p. iii. c. vii.

*Vattel*, l. i. c. xvi. s. 190; l. ii. c. xi. ss. 140, 151.

(b) *Grotius* indeed says that *usucapio* is the creature of the Civil Law, because nothing is done *by* time, though everything is done *in* time; but this seems an unworthy subtlety, and is inconsistent with other passages in his work.

"Le Temps, qui renferme en soi l'idée de la durée, de la répétition et de la succession des phénomènes, un des agents de modification, de destruction et de génération pour les choses physiques, restera-t-il sans influence sur la modification, sur la destruction et sur la génération des droits?"—*Domaine internat.*, par *E. Ortolan*, p. 98.

"*tas quæ semper pro lege tenetur*" (c). The doctrine of *Usucapio* exhibits the first trace of this mode of acquisition in Roman Jurisprudence (d). According to this doctrine, the possessor, *justo titulo et bona fide*, during two years of land, and during one year of movables, which had not previously belonged to him, acquired a property in it or them. This institution was originally confined to the *prædia Italica* and to the Roman citizen; but the Prætor extended it to the *fundi provinciales*, and to the *peregrinus*, under the appellation of *præscriptio longi temporis*. Justinian, who destroyed the distinction between civil and natural property, took also away the distinction between *fundi Italici* and *provinciales*, blended together the *usucapio* and the *præscriptio*, and conferred not only a right of possession but of property on the person who had possessed movables for three, and immovables for ten years *inter præsentés*, or twenty *inter absentes*, provided that the subject-matter had been capable of *usucapio* or *præscriptio*, and there had been *justus titulus* and *bona fides* (e). He also added another species of Prescriptive Acquisition, the *Præscriptio xxx vel xl annorum*. This *longissimi temporis*

(c) *Dig. xxxix. t. iii. 2*: see also *xlili. t. vii. 3*.

*Dig. xliii. t. xx. 3, 4*: "*Ductus aquæ cujus origo memoriam excessit, jure constituti loco habetur*."

(d) Which the Germans call *Ersitzung*. In the XII. Tables it bore the name of *usuauctoritas*, i.e. *usus et auctoritas*.

*Puchta, Instit. ii. s. 240*.

*Savigny, R. R. iv. s. 195*.

*Savigny, Recht des Besitzes, Abschnitt i. s. 2*.

*Instit. ii. 6, de usucapionibus et longi temporis præscriptionibus*.

*Dig. xli. t. iii. de usurpationibus et de usucapionibus*.—Code vii. t. 31, de usucapione transformanda et de sublata differentia rerum Mancipi et nec Mancipi.—33, de præscriptione longi temporis decem vel viginti annorum.—34, in quibus causis cessat longi temporis præscriptio.—35, quibus non obicitur longi temporis præscriptio.—38, ne rei dominicæ vel templorum vindicatio temporis præscriptione submoveatur.—39, de præscriptione xxx vel xl annorum.

(e) "Par là cessent les différences entre la propriété civile et la propriété naturelle—entre l'*usucapion*, cette patronne de l'Italie, et la *præscriptio*, cette patronne du genre humain."—*Troplong*, p. 139.

*Cod. C., De Usucapione transformanda*.

*possessio*, as it was afterwards called, did not confer property on the possessor or take it away from the proprietor, but it furnished the possessor with a defence against all claimants, and that though there had been no *justus titulus*. Besides these classes of Prescription measured by a definite time, was the indefinite class, Immemorial Prescription (*immemoriale tempus, possessio vel præscriptio immemorialis*), which was called *adminiculum juris quo quis tuetur possessionem, quæ memoriam hominum excedit* (f).

This kind of Prescription was available when the origin of the possession was incapable of proof—when nobody could recollect that it had belonged to another person. Such a Prescription might have for its object things incapable of being otherwise acquired, though not such things as were by nature *res communes*. It is mentioned, however, with reference to only three heads of what may be called *public law*—namely, 1. With reference to public ways (*viæ publicæ, privatæ, vicinales*). 2. To a right of protection from the rain-water (*aquæ pluvie arcendæ*). 3. The right relating to water-courses (*ductus aquæ* (g)).

CCLII. The passages in the Roman Law (h) show that the doctrine of *Immemorial Prescription* was applicable only to those few cases in which either a right of a *public* character, or an exemption from the obligation of such a right, was to be acquired. It is not surprising, therefore, that the doctrine should have occupied a very subordinate place in Roman jurisprudence, or, the reason of the thing being considered, that it should during the Middle Ages have risen into an institute of continual use and of the highest importance.

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(f) "The possession necessary to constitute a title by prescription must be uninterrupted and peaceable, both according to the Law of England, the Civil Law, and those of France, Normandy, and Jersey."—*Benest v. Papon*, 1 *Knapp Privy Council Reports*, p. 60.

(g) See note (c).

"*Scævola respondit solere eos, qui juri dicundo præsumt, tueri ductus aquæ quibus auctoritatem vetustatis daret, tametsi jus non probaretur.*"—*Dig. xxxix. t. iii. 20.*

(h) *Savigny, R. R. iv. s. 198.*

In the first two of the three instances specified in the *Digest*, Immemorial Prescription appears, on examination, to be unconnected with the fact of actual possession, but in the last to be necessarily bound up with it; and this condition is treated as indispensable in later jurisprudence.

CCLIII. The Canon Law (*i*) contains two remarkable instances of the application of Immemorial Prescription. In the year 1209 a Papal Legate forbade the Count of Toulouse the exercise of certain regal privileges with respect to the imposition of taxes. The Pope, at the request of the Count, declared that the prohibition extended only to the taxes arbitrarily imposed, and not to those which were equitable; under which class were to be reckoned those which had been permitted by the Emperor, the King, or the Lateran Council, and also those “*vel ex antiqua consuetudine, a tempore cujus non exstat memoria, introducta*” (*j*). The second passage relates to the case of a bishop, who claimed a *Prescriptive* Right to the tithes and churches within the see of another bishop. It has been seen that, according

(*i*) *Savigny, R. R.* iv. s. 198.

*Eichhorn, Kirchenrecht*, b. vii. c. vii. iv.: “*Verjährung gegen die Kirche.*”

*Suarez, de Leg.* l. viii. c. xxxv. s. 21. More than 100 years, however, were held necessary to establish a prescription against the Church of Rome: l. ii. t. xiii. c. ii., t. vi.

The distinction between “*Usucapio*” and “*Præscriptio*” is thus stated by one of the most eminent of modern canonists, *Schmalzgrüber (Jus Canonium*, vol. ii. p. 321). He says:

“*Distinctio propria et primaria*” is—

1. *Usucapio* is *cause*.
2. *Præscriptio* is *effect*.

“*Distinctio ordinaria*” is—

1. “*Usucapio*” concerns “*res corporales*” and requires actual possession, “*veram possessionem*.”
2. “*Præscriptio*” does not, but is content with *quasi possessio*.

The use of the phrase “*prescriptum est obligationi*” implies *opposition* to a *former proprietor*.

“*Præscripta est servitus, præscripsi rem*” implies “no more than legitimate acquisition.”

(*j*) x. lib. v. t. 40, c. 20, de V. S.

to the Roman Law, a possession for three, ten, or twenty years with, or for thirty without, a title, furnished the possessor with a defence on the ground of *præscriptio* or *usucapio* against any private claimant. Churches were, generally speaking, privileged against any Prescription less than forty years; but that Prescription against the Church did not require a title provided there were a *bona fides*. In the case of the bishop, however, this Prescription of forty years, it was said, would not avail, because it was contrary to the Common Law: “ubi tamen est ei *jus commune* contrarium” “vel habetur *præsumptio* contra ipsum, *bona fides* non sufficit: “sed est necessarius *titulus*, qui possessori causam tribuat “præscribendi: nisi tanti temporis allegetur *præscriptio*, *cujus* “*contrarii memoria non existat*” (k).

CCLIV. The tendency and spirit of modern legislation and jurisprudence has been to substitute, in *Private* Law, a short definite period of time in lieu of Immemorial Prescription.

In England, the “time of memory” was, at a very early period of her history, ascertained by the law to commence from the reign of a particular monarch; for though a custom was said to be good when it had been used “time out of “mind,” or “for a time whereof the memory of man runneth “not to the contrary,” the phrase referred to a *fixed* epoch, namely, that the custom was in use before the beginning of the reign of Richard I. Recent legislation has introduced a Prescription limited by a specific number of years, which it has substituted for the doctrine of immemorial usage (l).

(k) The whole passage in the sixth book of the *Decretals* is as follows: “Episcopum, qui ecclesias et decimas, quas ab eo repetis, proponit, licet in tua sint constitutæ diocesi, se legitime præscripsisse, adlegare oportet, cum *jus commune contra ipsum faciat*, hujusmodi præscriptionis titulum et probare; nam licet ei qui rem præscribit ecclesiasticam, si sibi non est contrarium *jus commune*, vel contra eam *præsumptio* non habeatur, *sufficiat bona fides*; ubi tamen,” &c.—l. ii. t. 13, cap. 1. *De Præscript.* in Vito.

(l) *Blackstone's Commentaries on the Laws of England*, b. 2, c. iii.



In France (*m*) Immemorial Prescription has been abolished, and a fixed period substituted; and in Austria; as well as in Prussia also, though in this country very long periods of time are required in certain cases (*n*).

CCLV. Secondly, as to Public Law. The doctrine of Immemorial Prescription is, from the very necessity of the case, indispensable (*o*) in the system of Public Law. Accordingly, we find it mentioned more than once in the Constitutions of the ancient German Empire, and as a mode of acquiring Public Rights (*p*).

Savigny illustrates the use of Immemorial Prescription in matters of Public Law by a reference to the condition of England from the Revolution of 1688 to the death of the last of the male Stuarts, the Cardinal of York, in 1806. During

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The rule was adopted when, by the Statute of Westminster (3 Edward I. c. 39), the reign of Richard I. was made the time of limitation in a writ of right.

Statute of 2 & 3 Will. IV. c. 71: An Act "for shortening the time of prescription in certain cases." It was the intention of this Act to establish practically and generally a 30-years', and certainly and universally a 60-years', prescription.—*Stephen's Comment.* b. ii. t. i. c. xxii.

See also 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57.

(*m*) *Code civil*.

"690. Les servitudes continuées et apparentes s'acquièrent par titre, ou par la possession *de trente ans*" (c. 688, 689, 706, s. 2177, 2232, 2281.)

"691. Les servitudes continuées non apparentes, et les servitudes discontinuées apparentes ou non apparentes, ne peuvent s'établir que par titres.

"La possession même immémoriale ne suffit pas pour les établir; sans cependant qu'on puisse attaquer aujourd'hui les servitudes de cette nature déjà acquises par la possession, dans les pays où elles peuvent s'acquérir de cette manière" (c. 688, 689.)

(*n*) Six, thirty, forty years in Austria.

Thirty, forty, forty-four, fifty years in Prussia.

*Blume, Deutsches Privatrecht*, s. 179.

*Savigny, R. R.* iv. s. 198.

(*o*) "Im öffentlichen Recht ist die unvordenkliche Zeit durchaus nicht zu entbehren, und es ist ganz gleichgültig wie wir Juristen darüber urtheilen, sie wird sich unfehlbar Bahn brechen, so oft eine Veranlassung dazu erscheint."—*Savigny, ib.*

(*p*) *Savigny, ib.*, citing *Aurea Bulla*, c. viii. s. 1: "A tempore cujus contrarii hodie non existit memoria." See too a *Reichsabschied* of 1548 and of 1576.

a considerable portion of this interval it might have been, and it actually was, a question of grave conscientious doubt to many whether the change of dynasty was the effect of temperate equity and wise policy, or of mere violence and injustice; and if, during this interval, a successful invasion had resealed the Stuarts upon the British throne, their right, as having continued unbroken, though suspended by violence, would have obtained a very general recognition. Who can point out, in this or in a similar instance, the exact year when the doubt was merged into certainty? and yet it is not difficult to describe the general character of such a transition. When the generation had passed away which had been alive during the former state of things; when the convictions, feelings, and interests of the succeeding generation had become identified with the new order of things, then might not improperly be said to begin the Prescription of Public Law. This is, in principle, very much the same as the Prescription of the Private Law; which, indeed, may be said to have been modelled upon the usage of Public Law, and which usage grew out of the reason of the thing.

CCLVI. Having discussed the position of prescription in the systems of Private and Public Law (*q*), we now approach the consideration of a matter, holden by the master mind of Grotius to be one of no mean difficulty, namely, International Prescription. Does there arise between nations, as between individuals, and as between the State and individuals, a *presumption* from long possession of a territory or of a right which must be considered as a legitimate source of International Acquisition?

In seeking an answer to this important question, it is necessary to keep clear of all subtle disquisitions with which this subject has been perplexed; whether, for instance, it be the creature of Natural or Civil Law, or whether it must

(*q*) 'Ἄλλὰ μὴν οὐδ' ἐκείνο ὑμᾶς λεληγεν, ὅτι τὰς κτήσεις καὶ τὰς ἰδίας καὶ τὰς κοινὰς, ἣν ἐπιγένηται πολλὸς χρόνος, κυρίας καὶ πατρώας ἅπαντες εἶναι νομίζουσι.—*Isocr., Orat. Archidam.*

always be founded upon a presumption of voluntary abandonment or dereliction by the former owner. Through these metaphysical labyrinths we cannot find a clue for questions of International Jurisprudence. The effect of the *lapse of time* upon the property and right of one nation relatively to another is the real subject for our consideration. And if this be borne steadily in mind, it will be found, on the one hand, in the highest degree irrational to deny that Prescription is a legitimate means of International Acquisition; and it will, on the other hand, be found both inexpedient and impracticable to attempt to define the exact period (*r*) within which it can be said to have become established—or, in other words, to settle the precise limitation of time which gives validity to the title of national possessions.

And therefore to the question, what duration or lapse of time is required by the canons of International Jurisprudence in order to constitute a lawful possession? it is enough to reply—First, that the title of nations in the actual enjoyment and peaceable possession of their territory, *howsoever originally obtained*, cannot be at *any* time questioned and disputed. Secondly, that a forcible and unjust seizure of a country which the inhabitants, overpowered for the moment by the superiority of physical force, ineffectually resist, is a possession which, lacking an originally just title, requires the aid of time to cure its original defect; and if the nation so subjugated succeed before that cure has been effected, in shaking off the yoke, it is legally and morally entitled to resume its former position in the community of States.

CCLVII. This is called, in technical language, the doctrine of *Postliminium*, which will be discussed hereafter (*s*).

(*r*) *Vattel*, l. ii. c. xii. s. 151, expresses a wish that such a period could be ascertained by the universal consent of nations: but the inexpediency is as great as the impossibility of such a scheme.

*Grotius* refers to the analogy of custom: "Tempus vero, quo illa consuetudo effectum juris accipit, non est definitum sed arbitrium, quantum satis est ut concurrat ad significandum consensum"—l. ii. c. iv. §, s. 2.

(*s*) *Vide post*, chap. xvi.

It must, however, be remarked here, that the rights of *Postliminium* can only attach to States which have been, previous to their subjugation, Independent Kingdoms. It was therefore with justice that the Allied Powers, in the adjustment of the relations between Belgium and Holland after the revolution of 1830, resisted certain Belgic claims founded upon an alleged *Postliminium*, on the ground that Belgium had never been an Independent State, had never been "*sui juris*," and could therefore have no title to the application of this doctrine.

CCLVIII. It is true that some later writers on the Law of Nations have denied that the doctrine of Prescription has any place in the system of International Law (*t*). But their opinion is overwhelmed by authority, at variance with practice and usage, and inconsistent with the reason of the thing. Grotius, Heineccius, Wolff, Mably, Vattel, Rutherford, Wheaton, and Burke (*u*), constitute a greatly preponderating array of authorities, both as to number and weight, upon the opposite side.

The practice of nations, it is not denied, proceeds upon

(*t*) *Klüber*, s. 6, 125.

*Martens*, l. ii. c. iv. s. 71.

(*u*) *Grotius*, l. ii. c. iv. : "De derelictione præsumpta et eam secuta occupatione: et quid ab usucapione et præscriptione differat;" and the commentary of *Heineccius* thereupon in his *Prælect. Acad. in Grot.*

*Burke*, *vide post*.

*Vattel*, l. ii. c. xi.

*Wheaton*, *Elém.* c. iv. s. 4, t. i. p. 159.

*Bynkershoek* may, I think, fairly be added to the list. Such it seems to me is the inference from the following, among other passages, in which he combats the possibility of the Dominion of the Sea being acquired by Prescription: "Sed Hugo Grotius (p. 386) et Vasquius Grotio representatus cap. vii. *Maris liberi*, docuerunt, longa possessione non quæri marium dominia. Et qui potest modus acquirendi, qui duntaxat est a Jure Civili, diversos principes obligare? Utitur etiam ea ratione Grotius, sed bene est, quod parcius, quia id ipsum rursus concessit (*de Jure B. et P.* lib. ii. c. 4) et ita nunc vulgo placet, si adsint, quas ille persequitur, tacitæ concessionis, indicia, præsumptiones aliaque adminicula, per quæ ipsa magis, quam per longi temporis capionem extraneos excludi jux fasque esset. At vero, per me licet, excute quicquid est

the presumption of Prescription, whenever there is scope for the admission of that doctrine. The same reason of the thing which introduced this principle into the civil jurisprudence of every country, in order to quiet possession, give security to property, stop litigation (*x*), and prevent a state of continued bad feeling and hostility between individuals, is equally powerful to introduce it, for the same purposes, into the jurisprudence which regulates the intercourse of one society with another, more especially when it is remembered that war represents between States litigation between Individuals (*y*). It is very strange that the fact, that most nations possess in their own municipal codes a positive rule of law upon the subject, has been used as an argument that the general doctrine has no foundation in International Law.

It is admitted, indeed, that Immemorial Prescription constitutes a good title to national possession; but this is a perfectly nugatory admission, if, as it is sometimes explained, it means only that a State which has acquired originally by a bad title, may keep possession of its acquisition as against a State which has no better title. If it had been merely alleged that the exact number of years prescribed by the

earum præsumptionum, et si quid conjecturis dandum, reperiēs gentium animos adversus præscriptionem maris omnimodo militare et nihil reliqui facere, quominus voluntatem suam enixe declarent; testantur id acta populorum publica, testatur quotidie suo quisque exemplo, dum, quod aliud mare in dominium suum transcribit, aliud eo vel invito ingrediatur et alterius possessionem, si quam prætendat, continua navigatione turbet."

And again he says: "Cæterum ne plura addam, Grotius et Vasquius in causa sunt, namque hi maris usucapionem subinverunt *eis rationibus quas meos facere non dubitem*, si demas, quæ ipsi aiunt de natura maris præscriptioni adversa, utpote re communi ex legibus Naturæ et Gentium, et quæ nec in bonis esse posset, nec possideri, nec quasi possideri, nec alienari, et cætera, de quibus non nihil dicam *cap. ult.*"—*De Dominio Maris Præscriptio*, c. vi.

(*x*) "Vetustas quæ semper pro lege habetur minuendorum scilicet litium causa."—*Dig. xxxix. t. iii. 2.*

(*y*) "Bono publico usucapio introducta est, ne scilicet quarundem rerum diu et fere semper iacerta dominia essent."—*Dig. xli. t. iii. 1.*

Roman Law, or by the municipal institute of any particular nation, as necessary to constitute ordinary prescriptions (z), is not binding in the affairs of nations, the position would be true. It is, perhaps, the difficulty attending the application to nations of this technical part of the doctrine, which has induced certain writers to deny it altogether; but incorrectly, for, whatever the necessary lapse of time may be, there unquestionably is a lapse of time after which one State is entitled to exclude every other from the property of which it is in actual possession. In other words, there is an International Prescription, whether it be called Immemorial Possession, or by any other name. The peace of the world, the highest and best interests of humanity, the fulfilment of the ends for which States exist, require that this doctrine be firmly incorporated in the Code of International Law. It is with great force of reason and language that Grotius, repelling the contrary proposition, observes: "Atque id si admittimus, sequi videtur maximum incommo-

(z) *Puffendorf*, under the title "*De Usucapione*," in the twelfth chapter of his fourth Book, discusses the application of the doctrine of Prescription to nations. His remarks are perspicuous and wise. "Inter hasce" (he says in his ninth section) "discrepantes sententias id quidem liquidum videtur: quemadmodum dominia rerum pacis causa sunt introducta, ita et illud ex eodem fonte promanare, quod possessores bonæ fidei aliquando sint in tuto collocandi, neve ipsis in perpetuum super sua possessione controversia queat moveri. Quantum autem sit illud spatium, intra quod possessio bonæ fidei in vim dominii evalescat, precise neque naturali ratione, neque universali gentium consensu determinatumprehenditur; sed arbitrato boni viri non citra aliquam latitudinem definiendum erit." He then refers with some humour to the vague tests of *prescriptive* poetry proposed in Horace, lib. 2, ep. 1, and proceeds:—"In designando autem hoc tempore ratio habebitur et antiqui domini, et recentis possessoris. Illius quidem, ut ne mature nimis a persequenda et investiganda sua re excludatur." And he closes the section with saying:—"Adeoque cum dominia rerum introducerentur, id quoque pacis causa placuisse, ut qui aliquid *neque vi, neque clam, neque precario*, suo nomine possideret, tantisper dominus præsumeretur, quoad ab altero contrarium probaretur; qui autem per longissimum temporis spatium, per quod nemo mediocriter diligens rem suam negligere creditur, quid bona fide possederit, serum petitem plane posset repellere, quia non citius rem suam vindicatum iverit."—*De Jure Naturæ et Gentium*.

“dum, ut controversiæ de regnis regnorumque finibus nullo  
 “unquam tempore extinguantur: quod non tantum ad pertur-  
 “bandos multorum animos et bella serenda pertinet, sed et  
 “*communi gentium sensui repugnat*” (a).

CCLIX. It is impossible to speak with greater accuracy upon this very delicate subject; as the application of the general rule must of necessity be greatly modified by the special circumstances of each particular case. Vattel's remarks upon this subject are clear and sensible:—

“La Prescription ne pouvant être fondée que sur une  
 “présomption absolue, ou sur une présomption légitime,  
 “elle n'a point lieu si le propriétaire n'a pas véritablement  
 “négligé son droit. Cette condition importe trois choses :  
 “1° que le propriétaire n'ait point à alléguer une ignorance  
 “invincible, soit de sa part, soit de celle de ses auteurs; 2°  
 “qu'il ne puisse justifier son silence par des raisons légi-  
 “times et solides; 3° qu'on ait négligé son droit, ou gardé  
 “le silence pendant un nombre considérable d'années; car  
 “une négligence de peu d'années, incapable de produire la  
 “confusion et de mettre dans l'incertitude les droits respec-  
 “tifs des parties, ne suffit pas pour fonder ou autoriser une  
 “présomption d'abandonnement. Il est impossible de dé-  
 “terminer en droit naturel le nombre d'années requis pour  
 “fonder la Prescription. Cela dépend de la nature de  
 “la chose dont la propriété est disputée, et des circon-  
 “stances” (b).

But that Prescription is the main pillar upon which the security of national property and peace depends, is as incon-

(a) L. ii. c. iv. s. 1.

See, too, Wolff.

And so Vattel: “Le droit de succession n'est pas toujours primitivement établi par la nation; il peut avoir été introduit par la concession d'un autre souverain, par l'usurpation même. Mais lorsqu'il est appuyé d'une longue possession, le peuple est censé y consentir, et ce consentement tacite le légitime, quoique sa source soit viciieuse. *Il pose alors sur le même fondement seul légitime et inébranlable, auquel il faut toujours revenir.*”—Vattel, t. i. l. i. c. v. s. 59.

(b) “De ce qui est requis pour fonder la Prescription ordinaire.”—

trovertible a proposition as that the property and peace of individuals rest upon the same doctrine (c).

To these remarks should be added the observation of a great modern jurist (d):—

“The general consent of mankind has established the principle, that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract or as positive law, all nations are equally bound by it, since all are parties to it; since none can safely disregard it without impugning its own title to its possessions; and since it is founded upon mutual utility, and tends to promote the general welfare of mankind.”

In one of those treatises (e) which show how deeply the

*Vattel, Le Droit des Gens*, t. i. l. ii. c. xi. s. 142. And again: “Mais si la nation protégée ou soumise à certaines conditions ne résiste point aux entreprises de celle dont elle a recherché l'appui, si elle n'y fait aucune opposition, si elle garde un profond silence quand elle devrait et pourrait parler, sa patience, après un temps considérable, forme un consentement tacite qui légitime le droit de l'usurpateur. Il n'y aurait rien de stable parmi les hommes, et surtout entre les nations, si une longue possession, accompagnée du silence des intéressés, ne produisait un certain droit. Mais il faut bien observer que le silence, pour marquer un consentement tacite, doit être volontaire. Si la nation inférieure prouve que la violence et la crainte ont étouffé les témoignages de son opposition, on ne peut rien conclure de son silence, et il ne donne aucun droit à l'usurpateur.”—*Vattel*, t. i. c. xvi. s. 199.

See list of authorities on the doctrine of International Prescription given by *Omnipedia*, 512, s. 213, *Lit. des Völkerrechts*.

(c) *Vattel*, l. ii. c. xi. s. 142.

(d) *Wheaton*, vol. i. c. iv. s. 5, p. 207.

“Es liessen sich viele Beispiele, unter andern in Deutschland nachweisen, wo das Recht der Staatsgewalt nur auf langen Besitzstand gegründet ist, ohne erweislichen Rechtstitel.”—*Heffter*, s. 69, 1.

(e) Vol. ix. p. 449. *Letter to R. Burke, Esq.*

See, too, vol. x. p. 97: *Reform of Representation in the House of Commons*. “Prescription is the most solid of all titles, not only to property, but, which is to secure that property, to Government.” And vol. v. p. 274: “With the National Assembly of France possession is nothing, law and usage are nothing. I see the National Assembly openly reprobate the doctrine of Prescription, which one of the greatest of their own Lawyers (Domat) tells us, with great truth, is part of the Law of



mind of the writer was imbued with the principles of general jurisprudence, Mr. Burke uses the following admirable expressions:—

“ If it were permitted to argue with power, might one not  
 “ ask one of these gentlemen, whether it would not be more  
 “ natural, instead of wantonly mooted these questions concerning their property, as if it were an exercise in law, to  
 “ found it on the solid rock of *prescription*?—the soundest,  
 “ the most general, the most recognized title between man  
 “ and man that is known in municipal or in public jurisprudence; a title in which not arbitrary institutions but the  
 “ eternal order of things gives judgment; a title which is not  
 “ the creature, but the master of positive law; *a title which, though not fixed in its term, is rooted in its principles in the Law of Nature itself*, and is indeed the original ground of  
 “ all known property; for all property in soil will always be  
 “ traced back to that source, and will rest there. . . .  
 “ These gentlemen, for they have lawyers amongst them,  
 “ know as well as I that in England we have had always a  
 “ prescription or limitation, *as all nations have against each other*. . . . All titles terminate in Prescription; in which  
 “ (differently from Time, in the fabulous instances) the son  
 “ devours the father, and the last Prescription eats up all  
 “ the former” (*f*).

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Nature. He tells us that the positive ascertainment of its limits and its security from invasion were among the causes for which civil society itself was instituted.”—*Reflections on the Revolution in France*.

(*f*) The *Abbé de Mably*, speaking of the Treaty of the Pyrenees, which followed the Treaty of Westphalia (1659), observes: “Le Roi de France proteste contre toute prescription et laps de temps, au sujet du Royaume de Navarre, et se réserve la faculté d'en faire la poursuite par voie amiable, de même que tous les autres droits qu'ils prétend lui appartenir, et auxquels lui ou ses prédécesseurs n'ont pas renoncé”—(*Traité de Vervin, rappelé par le Traité des Pyrénées*, art. 23. *Traité des Pyrénées*, art. 89.) “Tous les auteurs qui ont écrit sur le Droit des Gens conviennent que la prescription rend légitimes les droits les plus équivoques dans leur origine; et ce qui prouve la sagesse de ce principe, c'est qu'il est de l'intérêt de chaque nation en particulier de l'adopter. La difficulté consiste à savoir, comment la prescription s'acquiert; pour moi je croirois qu'elle ne peut être établie que par le silence de la partie lésée,

CCLX. In the foregoing observations, the foundation of International Prescription has not been necessarily laid upon the *abandonment* or *dereliction* of the State to whom the possession formerly belonged. It has been placed upon the length of time during which the possession has been held by the State which *prescribes* for it. It is important to establish clearly that *dereliction* does not, in the case of nations, necessarily precede prescriptive acquisition. Much of the uncertainty and confusion in the writings of International Jurists upon this subject may be ascribed to the want of firm discrimination and clear statement upon this point.

*Dereliction* or *voluntary abandonment* by the original possessor may be often incapable of proof between nations after the lapse of centuries of adverse possession; whereas the proofs of *prescriptive possession* are simple and few. They are, principally, publicity, continued occupation, absence of interruption (*usurpatio*), aided no doubt generally, both morally and legally speaking, by the employment of labour and capital upon the possession by the new possessor during the period of the silence, or the passiveness (*inertia*), or the absence of any attempt to exercise proprietary rights by the former possessor. The period of time, as has been repeatedly said, cannot be fixed by International Law between nations as it may be by Private Law between individuals: it must depend upon variable and varying circumstances; but in all cases these proofs would be required.

Now it has been well observed by a recent writer (g), that in cases where the dereliction is capable of proof, the new possessor may found his claim upon original Occupation alone, without calling in the aid of Prescription. The loss

quand elle traite avec le Prince qui possède son bien, ou que celui-ci le vend, le cède et l'aliène en quelque autre manière. Le silence dans ces occasions équivaut à un consentement."—*Droit public*, t. i. p. 31.

(g) Monsieur Eugène Ortolan. See his chapter on *Prescription acquiescive*, in his work *Du Domaine international* (Paris, 1851).

of the former, and the gain of the later possessor, are distinct and separate facts. Whereas, in cases of Prescriptive Acquisition, the facts are necessarily connected; the former possessor loses, because the new one gains.

CCLXI. There was a dispute of long standing between France and England respecting Santa Lucia, one of the Antilles Islands. After the Treaty of Aix-la-Chapelle (1748), the matter was referred to the decision of certain Commissioners, and it was the subject of various State Papers (*h*) in 1751 and 1754. The French negotiators maintained, that though the English had established themselves in 1639, they had been driven out or massacred by the Caribbees in 1640, and they had, *animo et facto* and *sine spe redeundi*, abandoned the island; that Santa Lucia being *vacant*, the French had seized it again in 1650, when it became immediately, and without the necessity of any prescriptive aid, their property. The English negotiators contended that their *dereliction* had been the result of violence, that they had not *abandoned* the island *sine spe redeundi*, and that it was not competent to France to profit by this act of violence, and surreptitiously obtain the territory of another State; and that by such a proceeding no *dominium* could accrue to them. The principal discussion turned, not upon the nature of the conditions of Prescriptive Acquisition, but upon the nature of the conditions of Voluntary Dereliction, by which the rights of property were lost, and the possession returned to the class of vacant and unowned (*ἀδέσποτα*) territories (*i*).

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(*h*) Eugène Ortolan, *Du Domaine international*, p. 111.

(*i*) *Vide post*, Chap. xvi.: EXTINCTION OF DOMINION.

## CHAPTER XIV.

## DERIVATIVE ACQUISITION.

CCLXII. WE now enter upon the second kind of Acquisition, viz. that which in the system of Private Law is called *Derivative*.

Derivative Acquisition (*a*) is said to be that which takes place by the act of another, or by the act of the law (*acquisitio derivativa, vel facto hominis, vel facto legis*). In this system not only Individuals, but Corporations or legal persons, are enabled to acquire and to alienate rights of property, through the medium of a representative, as minors and lunatics are in all systems of jurisprudence enabled to act through their guardian or tutor.

Who the representative of the corporation may be, depends upon the constitution of this legal person. But, as a general rule, the will of a corporation is expressed not only by the unanimous assent, but by the assent of the major part of its members. The rule that the will of the corporation may be collected from the agreement of a part of its members seems to be founded in Natural Law, as otherwise the body might be prevented from acting at all (*b*).

(*a*) *Eugène Ortolan*, p. 23.

*Heffter*, s. 71.

(*b*) "— quod a *major*e parte ordinis salubriter fuit constitutum."—*Cod. x. t. 32, 46. De Decur.*

"Quod *major pars curiæ* effecit, pro eo habetur, ac si omnes egerint."—*Dig. l. 1, 19.*

*Savigny R. R.* s. 97.

But see *Burke*, vol. vi. p. 212: *Appeal from the New to the Old Whigs.*

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The constructive whole, therefore, is holden, for certain purposes, to reside in a part only.

Turning from the system of Private to the system of International Law, we find that it is competent to one State possessed of property to alienate it, and to another to receive the alienated portion. So far the analogy is sound between the State and the Individual or the Corporation; the rights incident to a proprietor attach in both cases. But, in the case of the State, it may be a matter of theoretical and practical difficulty to ascertain where and in whom the power of acquiring and alienating is lodged? in whom what has been happily called "the contracting capacity" (*c*) of the nation is vested (*d*)? whether the general procuration of the State (*e*) be placed in the hands of one man, or of a few, or of a majority of representatives? The solution of this grave question belongs rather to the province of Public and Constitutional than to that of International Law (*f*). It has, indeed, been discussed by writers on International Law, especially by Grotius (*g*) and Vattel (*h*): but both those writers dealt, on this as on other occasions, with subjects which belonged to the sphere of the Publicist rather than that of the International Jurist.

CCLXIII. Grotius (*i*) divides all kingdoms into Patri-

(*c*) *Burke*, vol. ix. p. 384: *Tracts on Popery Laics*, c. 3, *in fine*.

(*d*) *Vide post*, the Act of Renunciation of the Grand Duchy of Tuscany by Leopold II., on his accession to the throne of Austria, in favour of his second son.—*Martens, Rec. de Traités*, vol. iv. p. 476. (A.D. 1790.)

*Eugène Ortolan*, pp. 14, 35.

*Rutherford, Institutes of Natural Law*, c. viii.

*Savigny R. R.* s. 140, b. iii. p. 310.

(*e*) *Burke*, vol. vi. p. 212: *Appeal from the New to the Old Whigs*.

(*f*) *Grotius*, l. ii. c. vi.

*Wheaton's Elements*, pp. 102-3.

*Günther*, pp. 11-77, Buch 2, Kap. ii.

(*g*) *Grotius*, l. ii. c. vi.: *De acquisitione derivativa facto hominis, ubi de alienatione imperii, et rerum imperii*.

(*h*) *Vattel*, l. i. c. xxi.: *De l'Aliénation des biens publics, et de celle d'une partie de l'Etat*.

(*i*) *De Jure Belli*, l. i. c. iii.—*Heinecc. Prælec.*

monial and Usufructuary; and he reckons among the latter all kingdoms over which the people elected a Governor, and all that are acquired by treaty or marriage. Patrimonial kingdoms, he seems to think, may be alienated by their rulers without the sanction of the people; but Usufructuary, not without their consent. Whatever countenance this doctrine might have derived from the practice and principles of the time in which Grotius lived, it can hardly be predicated of any Christian, and certainly of no European State (*j*) at present existing in the world. Puffendorf, indeed, lays it down as law, that the general presumption is against the power of the sovereign to alienate, without the consent of his subjects, any portion of the public property or domain; and the doctrine is distinctly and indignantly repudiated by Vattel (*k*); nevertheless, a miserable attempt was made in

(*j*) "Die Eigenschaft eines Patrimonial-Staates (das heisst, dass der Regent nach *Eigenthumsrecht* über den Staat verfügen könne) ist in Europa durch Staatsgrundgesetze nirgend festgesetzt."—*Klüber*, s. 31.

"He will discover that when Grotius examines the subjects in detail he excludes every case of *patrimonial* governments. The fair conclusion to be drawn from it is therefore this, that there is no such thing as a patrimonial government."—*Lord Grenville, Debate on Blockade of Norway*, May 10, 1814. *Hansard's Parl. Deb.*

(*k*) "J'ai osé cependant m'écarter quelquefois de mon guide, et m'opposer à ses sentiments; j'en donnerai ici quelques exemples. M. Wolf, entraîné peut-être par la foule des écrivains, consacre plusieurs propositions à traiter de la nature des royaumes *patrimoniaux*, sans rejeter ou corriger cette idée injurieuse à l'humanité. Je n'admets pas même la dénomination, que je trouve également choquant, impropre, et dangereuse dans ses effets, dans les impressions qu'elle peut donner aux souverains; et je me flatte qu'en cela j'obtiendrai le suffrage de tout homme qui aura de la raison et du sentiment de tout vrai citoyen."—*Vattel, Préface*.

And again, l. i. c. v.: "Nous ne voyons point en Europe de grand Etat qui soit réputé aliénable."

In another part of his work he limits the power of alienating national property as follows:—"Le corps de la nation ne peut donc abandonner une province, une ville, ni même un particulier qui en fait partie, à moins que la nécessité ne l'y contraigne, ou que les plus forts raisons, prises du salut public, ne lui en fassent une loi."—L. i. c. ii.

*Puffendorf, de Jure Nat. et Gent.* l. viii. c. xii. ss. 1-3.

*Vattel*, l. i. c. xxi. s. 260: "Il ne peut aliéner les biens publics."

1814 to palliate the guilt of the forcible annexation of Norway to Sweden by an appeal to the authority of Grotius.

CCLXIV. So far, indeed, as respects the conduct of third parties in transactions of this nature, International Law may claim to be heard. How far the right of Self-preservation (which includes the right of preventing the undue aggrandisement of any particular Power) justifies the INTERVENTION of third Powers, will be hereafter considered.

The rule which, according to the true principles of International Law, ought to be binding upon all nations who are, as it were, bystanders in such transactions, is, rigidly and punctiliously to abstain from interfering to compel by force either part of the nation, whether it be that which wishes to alienate or that which refuses to be alienated, to adopt the one course or the other. To do otherwise, is directly to violate the most sacred principle of the jurisprudence of which we are treating, to trample in the most offensive way upon the independence of a nation, by assuming the judicial office upon the nicest and most vital questions of her constitutional law, and the executive office, in carrying this unwarranted and illegal decision into effect.

CCLXV. When in 1814 Norway refused, as she did, by the actual and constructive voice of her people, to be annexed to Sweden, the question should have been left, according to the spirit and letter of the law, to the decision of arms between the two countries. It is painful and humiliating to an Englishman (*1*) to think that this abhorred union, for such it was at the time, was effected, partly, by the blockade of a British fleet. The plea that such a union formed part of the provisions of a general treaty of peace, which had for its

(1) See the debates in both Houses of Parliament on the blockade of Norway, 1814, *Hansard's Parl. Deb.*, especially the speeches of Lord Grenville and Sir James Mackintosh, which contain an admirable exposition of the soundest principles of International Law. Lord Grenville condemns the act as subversive of public morality, as opposed to the authority of all writers upon International Law, as justifying in principle the aggressions of France for the preceding twenty years.

object the re-establishment and pacification of Europe, after years of bloodshed and misery, did not justify the grievous injustice, the intrinsic illegality of this act. The delivery of Genoa to Sardinia, after that republic had yielded to our arms on the faith of its national independence being preserved, was as wrongful an act, accompanied with the additional sin of violating a faith specifically pledged. To both these cases the expressions of *Martens*—no favourer of democracy—were fully applicable: “Il en est de même “ *de l'impossibilité morale à l'égard des traités dont l'accomplissement blesserait les droits d'un tiers*” (*m*).

CCLXVI. Though such be the rule of law to which nations, being in the condition of third parties and bystanders, should scrupulously adhere, there can be no doubt that one nation may by its proper organ, whatever that may be, alienate, and that another nation may receive, property. It is, moreover, of the last importance to remember that a nation which allows its ruler, either in his own person or through his minister, to enter into negotiations respecting the alienation of property with other nations, must be holden to have consented to the act of the ruler; unless, indeed, it can be clearly proved that the other contracting party was aware at the time that the ruler in so doing was transgressing the fundamental laws of his State (*n*).

(*m*) *Martens, Des Traités non obligatoires*, l. ii. c. ii. s. 53.

(*n*) “A l'occasion du même traité de *Madrid*, dont nous venons de parler, les notables du royaume de France, assemblés à *Cognac*, après le retour du roi, conclurent tous d'une voix, ‘que son autorité ne s'étendait point jusqu'à démembrer la couronne.’ Le traité fut déclaré nul, comme étant contraire à la loi fondamentale du royaume. Et véritablement il était fait sans pouvoirs suffisants; la loi refusait formellement au roi le pouvoir de démembrer le royaume; le concours de la nation y était nécessaire, et elle pouvait donner son consentement par l'organe des Etats-généraux. *Charles V* ne devait point relâcher son prisonnier avant que ces mêmes Etats-généraux eussent approuvé le traité; ou plutôt, usant de sa victoire avec plus de générosité, il devait imposer des conditions moins dures, qui eussent été au pouvoir de *François I<sup>er</sup>* et dont ce prince n'eût pu se dédire sans honte. Mais aujourd'hui que les Etats-généraux ne s'assemblent plus en France, le roi demeure le seul organe



CCLXVII. This is the universally acknowledged distinction between cases of internal transactions between the State and its Subjects, and of international transactions between the State and other Nations. The reasons which support this leading position of International Law are perspicuously stated by Vattel:—

“ Il est nécessaire que les nations puissent traiter et transiger valablement entre elles, sans quoi elles n'auraient aucun moyen de terminer leurs affaires, de se mettre dans un état tranquille et assuré. D'où il suit que quand une nation a cédé quelque partie de ses biens à une autre, la cession doit être tenue pour valide et irrévocable, comme elle l'est en effet, en vertu de la notion de *propriété*. Ce principe ne peut être ébranlé par aucune loi fondamentale, au moyen de laquelle une nation prétendrait s'ôter à elle-même le pouvoir d'aliéner ce qui lui appartient. Car ce serait vouloir s'interdire tout contrat avec d'autres peuples, ou prétendre les tromper. Avec une pareille loi, une nation ne devrait jamais traiter de ses biens: si la nécessité l'y oblige, ou si son propre avantage l'y détermine, dès qu'elle entre en traité, elle renonce à sa loi fondamentale. On ne conteste guère à la nation entière le pouvoir d'aliéner ce qui lui appartient; mais on demande si son conducteur, si le souverain a ce pouvoir. La question peut être décidée par les lois fondamentales. Les lois ne disent-elles rien directement là-dessus? Voici notre second principe. 2° Si la nation a délégué la pleine souveraineté à son conducteur, si elle lui a commis le soin, et donné sans réserve le droit

de l'Etat envers les autres puissances; elles sont en droit de prendre sa volonté pour celle de la France entière, et les cessions que le roi pourrait leur faire demeureraient valides, en vertu du consentement tacite par lequel la nation a remis tout pouvoir entre les mains de son roi, pour traiter avec elles. S'il en était autrement, on ne pourrait contracter sûrement avec la couronne de France. Souvent, pour plus de précaution, les puissances ont demandé que leurs traités fussent enregistrés au parlement de Paris; mais aujourd'hui cette formalité même ne paraît plus en usage.”— *Vattel*, l. i. c. xxi. s. 265.

*Kent's Comm.* Part I., Lecture viii., s. 3.

“de traiter et de contracter avec les autres Etats, elle est censée l’avoir revêtu de tous les pouvoirs nécessaires pour contracter valablement. Le prince est alors l’organe de la nation; ce qu’il fait est réputé fait par elle-même; et bien qu’il ne soit pas le propriétaire des biens publics, il les aliène valablement comme étant dûment autorisé” (o).

CCLXVIII. Upon the same principle, when foreign Governments or their subjects have obtained from the *de facto* Government of a country, by treaty or otherwise, a part of the national domain of confiscated property, if the sovereign *de jure* be restored, he cannot annul this contract or cession. Whatever power he may possess to annul alienation made to his own subjects, the acts of the *de facto* Government, though it was that of a usurper, are binding upon him as to all international transactions (p).

There can be no doubt, then, that a State may make acquisitions by the acceptance of property transferred to it from another State. This transference may be effected in as great a variety of ways in the case of the State, as in the case of the individual.

According to the principles of Private Law, the delivery (*traditio*) of possession (q) effected a change of ownership (*dominii*), the deliverer transfers the rights which he had enjoyed to the receiver (r).

The validity of the transaction depends upon considerations relating to—

(o) *Vattel*, l. i. c. xxi. s. 262.

(p) *Grotius*, l. ii. c. xvi. s. 16.

*Wheaton*, *Elements*, vol. i. p. 102.

*Mably*, *Droit pub.* t. ii. p. 271.

(q) “Hæ quoque res, que traditione nostræ fiunt, jure gentium nobis acquiruntur; nihil enim est tam conveniens naturali æquitati, quam voluntatem domini volentis rem suam in alium transferre ratam haberi.” — *Dig.* xli. t. i. 9, 3.

“Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur.” — *Cod.* ii. 3, 20 (*de Pactis*).

(r) “Quoties autem dominium transfertur, ad eum qui accipit tale transfertur, quale fuit apud eum qui tradit.” — *Dig.* xli. t. i. 20, 1.

1. The person delivering or transferring the property.
2. The cause of the transference.
3. The form and manner in which it is transferred.

1. The person (*s*) must have the will and the power to alienate the thing, and the alienee the will and power to receive it.

2. The cause (*t*) must be lawful and just; that is to say, it must be such as warrants the transference, and must not relate to a class of things which may not be alienated.

3. The form and manner (*u*) need not be such as to convey the thing by corporal seisin; overt acts indicating the intention of the alienator or symbolical delivery may suffice.

The Treaty of Partition in 1700, which parcelled out among various European nations the dominions of the Spanish crown upon the demise of the wearer of it, without the consent either of him or of the nation, provided by its ninth article that the Kingdom of Spain should never be held in joint possession with that of France or Germany, however it might have accrued to either of these countries—"soit par *succes-sion, testament, contrat de mariage, donation, échange, cession, appel, révolte, ou quelque autre voie que ce soit.*" And in that part of the great Treaty of Utrecht, which in 1713 was

(*s*) "Traditio nihil amplius transferre debet vel potest ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert; si non habuit, ad eum qui accipit nihil transfert."—*Dig. xli. t. i. 20, 1.*

"Nihil autem interest utrum ipse dominus tradat alicui rem, an voluntate ejus alius cui ejus rei possessio permissa sit."—*Inst. ii. t. i. 42.*

(*t*) "Nunquam nuda traditio transfert dominium, sed ita, si venditio, aut aliqua *justa causa*, præcesserit propter quam traditio sequeretur."—*Dig. xli. t. i. 31.*

(*u*) *Dig. xli. t. iii. 79, de Solut.; xli. t. ii. 18, 2; xxiii. t. iii. 43, 1, de j. dot.*

"Interdum etiam sine traditione nuda voluntas domini sufficit ad rem transferendam; veluti si rem, quam commodavi aut locavi tibi aut apud te deposui, vendidero tibi; licet enim ex ea causa tibi eam non traderim, eo tamen quod patior eam ex causa emtionis apud te esse tuam officio."—*xli. t. i. 9, 5.*

concluded between France and the States-General, it was provided: "On est aussi convenu qu'aucune Province, Ville, " Fort, ou Place desdits Pais-Bas Espagnols, ni de ceux qui " sont cédés par sa Majesté Très-Chrétienne, soient jamais " cédés, transportés, ni donnés, ni puissent échoir à la Cou- " ronne de France, ni à aucun Prince ou Princesse de la " Maison ou Ligne de France, soit en vertu de quelque *Don*, " *Vente*, *Echange*, *Convention matrimoniale*, *Succession par* " *testament*, ou *ab intestat*, ou sous quelque autre Titre que ce " puisse être, ni être mis de quelque manière que ce soit au " pouvoir, ni sous l'autorité du Roi Très-Chrétien, ni de " quelque Prince ou Princesse de la Maison ou Ligne de " France " (x).

These provisions contain an enumeration of every conceivable mode of acquisition, except that of original occupation, discussed in the foregoing chapters. Many historical examples may be cited of these International titles to property.

CCLXIX. The *exchange* of territories, and especially of portions of territories, is familiar to all who are acquainted with European History, and with the provisions of the principal treaties. Thus, in the Treaty of Nimeguen, it is provided by Article XIV., "pour prévenir toutes les diffi- " cultés que les enclaves ont causées dans l'exécution du " traité d'Aix-la-Chapelle, et rétablir pour toujours la bonne " intelligence entre les deux couronnes, il a été accordé que " les terres enclavées seront échangées contre d'autres qui " se trouveront plus proches et à la bienséance de S. M. " Catholique," &c. The islands of Sardinia and Sicily (y), the

(x) *Günther*, vol. ii. p. 91.

Art. xiv. *Schmauss*, p. 1393.

(y) "Reference had been made indeed to other territories, the Germanic body, the States of Italy, Sicily, &c., where cessions were frequent; but they were only nominally independent; they were attached to larger kingdoms; they were the infirm and palsied limbs of Europe, and became invariably the first points of attack in every war."—*Hansard's Debates in Parliament on the Blockade of Norway*, 1814, Speech of Sir James Mackintosh.

Duchies of Tuscany, Parma, and Placentia, were continually exchanged with each other in the multiplicity of entangled negotiations which intervened between the Peace of Utrecht, in 1713, and the Treaty of Aix-la-Chapelle, in 1748. By the 6th Article (z) of the Quadruple Alliance in 1720, Philip V. of Spain renounced the reversionary title on Sicily, conferred on him by the Treaty of Utrecht, and received in exchange a reversionary title to Sardinia; and by the first Article, the Duke of Savoy made a reciprocal renunciation of his rights to Sicily. By the same Treaty, it was agreed that the reversion of Tuscany, Parma, and Placentia, about to be vacant by the extinction of the male descendants of the Houses of Medici and Farnese, should be declared male fiefs of the Empire, and the investiture be conferred by the Emperor on the eldest son of the second wife (Elizabeth Farnese) of Philip V. (a).

By the Treaty of Vienna, in 1738, Tuscany was given, in reversionary exchange for the Duchy of Lorraine, to the Duke of that province; Naples and Sicily to Don Carlos, the son of Philip V.; while Parma and Placentia were ceded to the Emperor.

In 1790, Leopold II., succeeding to the Austrian Empire, renounced by a formal act—in which his eldest son Francis (afterwards Emperor) joined—his sovereignty over Tuscany, in favour of his second son, Ferdinand III., who confirmed the act, and accepted in due form the sovereignty. These “actes,” the address of the Regius Advocatus, and the reply of the Senate to the Grand Duke through their organ the principal Senator, are all contained in what is called in the Diplomatic Code the “Acte de cession du Grand-Duché de Toscane à la branche puînée de la maison de l’Autriche” (b).

(z) Koch, *Hist. des Tr.* t. i. c. xiii. p. 236.

(a) Koch, t. i. c. xv. p. 256.

(b) Martens, *Rec. de Traité*s, tom. iv. (1785-90), p. 473: “Acte de renonciation de S. M. I. et R. Léopold II, par rapport au Grand-Duché de Toscane, en faveur de S. A. R. l’Archiduc Ferdinand, son second fils,

By the last Treaty of Vienna (1814-15 (c)), these Italian provinces were again parcelled out among various Powers; and the Stati dei Presidi (a district belonging anciently to Sienna), the Island of Elba, and the Principality of Piombino (over which the Crown of Naples had exercised feudal rights (d)), were thrown into the portion of Tuscany, and given to the Archduke Ferdinand of Austria.

CCLXX. *Cessions* (e) of territory are generally consequent on war, and the subjects of provisions in the Treaties which conclude it; but instances are to be found of their taking place in the time of peace. In 1777, Portugal ceded to Spain the Islands of *Annobon* and *Fernando del Po*, in order to facilitate the slave trade of Spain with the coast of Africa. In 1784, France ceded to Sweden the islands of St. Bartholomew in the West Indies, in return for the free use of the harbour of Gottenburg, and certain other commercial advantages. A recent instance of cession is afforded by the Convention in 1850 between Great Britain and Denmark, whereby Denmark ceded to Great Britain, in consideration of the sum of ten thousand pounds, all the possessions of the Danish Crown on the Gold Coast, or Coast of Guinea, in Africa (f). In 1867 the Russian territories in North America were ceded to the United States for 7,200,000 dollars.

CCLXXI. *Gifts* of territory were not uncommon in earlier times; for, not to mention the handsome presents, already adverted to, of different parts of the globe made by

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et des descendants mâles de celui-ci, ensemble avec l'acte d'investiture du Grand-Duché et la cession pleine et entière de ce pays, tant de la part de S. M. I. et S. A. Léopold II, que de S. A. R. l'Archiduc François (aujourd'hui Empereur), à la Secundo-geniture, en date de Vienne le 21 Juill. 1790, ainsi que l'acceptation de S. A. R. le Grand-Duc Ferdinand III de la confirmation des loix, statuts, etc. du Grand-Duché en date du 22 fév<sup>r</sup> 1791, et de l'hommage prêté au Grand-Duc le 16 mars 1791."

(c) *Koch*, vol. iii. c. xli. p. 493.

(d) I. e. *la suzeraineté*, relating to *le droit féodal*, distinguished from *la suzeraineté* which relates to *droit politique*.

(e) *Günther*, vol. ii. p. 94 (*Abtretung*).

(f) *Annual Register*, vol. xcii. p. 391, art. i.

the Pope to Spain and Portugal, John XVIII., in 1004, offered the island of Sardinia to whomsoever would take it from the Saracens; and Boniface VIII. (*g*), in 1297, bestowed the same island, together with Corsica, upon James II. of Arragon. In 1485, Queen Charlotte of Cyprus (*h*) gave that island to Duke Charles I. of Savoy; and, in 1530, the Emperor Charles V. (*i*) gave Malta to the Knights of St. John. We may pass over the earlier alleged donations of Pepin and Charlemagne to the Roman See, and the acquisitions of the French Crown by gift, such as the province of Dauphiné in 1349.

CCLXXII. The history of Louisiana furnishes a more recent and very remarkable instance of the practical application of some of the foregoing modes of acquisition by independent nations.

By a secret *Convention* (*j*) (never, it is said, yet printed) between the Courts of Versailles and Madrid, on November 2, 1762, New Orleans, together with that part of Louisiana which lies on the western side of the Mississippi, was ceded to Spain. The object of this cession was to indemnify Spain for the loss of Florida, which, by the preliminaries of the memorable Treaty of Paris (*k*), she had given up to Great Britain; and, in spite of the remonstrances of the French inhabitants of Louisiana, Spain took complete possession of this province in 1769.

By a secret Treaty concluded between the French Republic and Spain, at Saint Ildefonse, on October 1, 1800, Spain engaged to retrocede to France—six months after the fulfilment of certain conditions relative to the Duchy of Parma, in favour of the daughter of the King of Spain—the province of Louisiana as at that time possessed by Spain.

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(*g*) *Günther*, vol. i. p. 95; *Schmauss*, vol. i. p. 14.

(*h*) *Schmauss*, vol. i. p. 124.

(*i*) *Günther*, vol. i. p. 96.

(*j*) *Koch*, *Hist. des Traités*, c. xvii.; *Traités de Paris et de Hubertsbourg*, vol. i. p. 362.

(*k*) The secret Convention was signed on the same day as the preliminaries of the Treaty. The Treaty itself was not signed till 1763.

As soon as this Treaty was made known, Great Britain and the United States took alarm, and determined to oppose to the utmost its completion. Buonaparte, then First Consul, urged by the difficulty of his position, and partly perhaps also by his need of pecuniary resources, resolved upon the expedient of selling his new, or rather inchoate, acquisition to the United States. To this bargain, however, he gave the name of *Cession*, and it was effected by the Treaty of Paris of 1803 between France and the United States of North America. The words of the Convention were remarkable:—

“Attendu, y est-il dit, que par l'article 3 du Traité conclu à Saint-Ildéonse, le 9 vendémiaire, an ix, entre le Premier Consul de la République Française et S. M. C., il a été convenu ce qui suit : [ici est inséré l'article ;] et comme, par suite dudit traité, et spécialement dudit art. 3, la République Française a un titre incontestable au domaine et à la possession dudit territoire, le Premier Consul de la République, desirant de donner un témoignage remarquable de son amitié aux dits Etats-Unis, leur fait, au nom de la République Française, cession, à toujours et en pleine souveraineté, dudit territoire, avec tous ses droits et appartenances, ainsi et de la manière qu'ils ont été acquis par la République Française, en vertu du traité susdit, conclu avec S. M. C.” (1).

The peculiarity of this form arose from the fact that the Treaty of October 1800 had never been formally executed by either of the contracting parties. The ninth article of this Treaty provided that two particular conventions, to be signed the same day, should be considered as inserted in the Treaty itself. The first contained the stipulation that sixty millions of francs should be paid to France; the second, that all claims upon France by the United States for illegal captures or other matters should be considered as discharged.

It belongs to the province of the historian to record the ineffectual regret of deceived and injured Spain, and the

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(1) Koch, vol. ii. p. 322.



sagacity of the United States in profiting by the troubles of Europe, both at this period and subsequently by the acquisition of Western Florida. But it should be observed here that the instance illustrates national acquisition by *gift, sale, and exchange*, and that the title of the United States to this acquisition has never been questioned.

The fate of Venice has been remarkable. Bestowed like a chattel upon Austria by the First Napoleon, she obtains her liberty from his nephew in a manner which could scarcely have been foretold.

In the war of 1866 between Prussia and Austria, in which Italy was the ally of the former Power, Austria ceded to France Venetia, which France accepted, and, by the Treaty of Vienna, August 24, 1866, conferred upon Italy an arrangement recognized by a Treaty of the 23rd of October in the same year between Austria and Italy (*m*).

CCLXXIII. The *Election* of an individual to the sovereignty of a State, though not strictly speaking a mode of acquiring territory, may indirectly be the cause of it, when the elected person is already ruler over an independent kingdom, to which the new State becomes united. Thus the Poles, by the election of the Duke Jagello in 1386, united Lithuania to their own kingdom. And this result may ensue not only in the case of an elective sovereignty, but also in the instances, not infrequent in history, of the failure of the first line of sovereigns, and the consequent necessity of choosing a collateral branch (*n*).

Towards the close of the fourteenth century (*o*) (1375) the race of King *Svend Estrithson* became extinct in the person of Waldemar IV. His grandchild Olaf, the son of his youngest daughter Margaret, wife of the King of Norway and the asserted heir of Sweden, was chosen successor to the throne, because he would eventually unite Norway with Denmark (*p*)

(*m*) *Ann. Reg.* 1866, p. 260.

(*n*) *Günther*, vol. ii. p. 97.

(*o*) *Dahlman's Geschichte von Dänemark*, Band 2, pp. 46-75.

(*p*) The senators were at first divided, some wishing for the acquisition

Olaf died in 1387, and his ambitious and energetic mother, having survived her mother and child, and seized upon the sceptre of Sweden in 1387, united the then Scandinavian kingdoms under one monarchy by the famous Union of Calmar in 1397.

The election of the House of Brunswick to the throne of Great Britain brought with it the union of Hanover, though happily for a limited time only, to these kingdoms.

CCLXXIV. *Marriage (contrat de mariage)* of the hereditary governor of a country has been frequently a mode of acquisition of new territory to that country, sometimes by the incorporation of a province, sometimes by the union of two distinct and independent kingdoms.

The wife of Charles II. of England brought with her Tangiers and Bombay as a dowry ; and the latter has proved no unimportant addition to the empire of Great Britain. Philip III. of France acquired to the French throne the countries of Carcassonne and Béziers, the dowry of his wife, Isabella of Arragon. Alphonso III. of Portugal acquired the province of Algarves to the throne of that country as the dowry of his wife, the natural daughter of Alphonso X. of Castille (*q*).

Philip IV. of France acquired the independent kingdom of Navarre by his marriage with Joanna, Queen of that territory ; and though, after a time, Navarre again returned to the government of its own monarchs, it was finally acquired to the throne of Spain by the marriage of Blanche of Navarre to John II. of Arragon in 1425. France acquired, through the successive marriages of Charles VIII. and Louis XIII. with Ann of Brittany, that great and formerly independent Duchy.

The House of Hapsburg owes its power and station partly to the imperial dignity which it obtained toward the

to be acquired by the Union ; others objecting that Denmark, an elective monarchy (*ein freies Wahlreich*), would thereby be subjected to Norway, an hereditary kingdom (*Erbreich*), *ib.* 52.

(*q*) *Günther*, vol. ii. p. 98 (*Abtretung*).

end of the thirteenth century, but still more to the marriages which the Emperors of Austria have contracted with heiresses.

Mary of Burgundy, the daughter and sole heiress of the last Duke of that name, brought with her the magnificent dowry of the Low Countries, including Franche-Comté, Flanders, and Artois, to the Emperor Maximilian (*r*). The son of this marriage, Philip the Handsome, married the sole heiress of the crowns of Arragon and Castille, so that it has not been untruly sung by a poet of modern date,—

Bella gerant alii, tu, felix Austria, *nube*;  
Nam quæ Mars aliis, dat tibi regna Venus.

Sometimes national rights and claims have been conferred by marriage. At the Peace of Noyon, in 1516, Francis I. of France promised to give with his daughter on her marriage with the then King Charles of Castille all his rights and title to the kingdom of Naples; and in the abortive matrimonial negotiations between the two thrones, it was stipulated that certain lands should be given in compensation for the non-fulfilment of a contracted marriage by the party causing it (*s*).

The marriage of sovereigns may or may not occasion a permanent incorporation of territories according to the laws of the respective kingdoms, by which will also be governed the rank of each sovereign and their respective powers and authorities. The instances of Philip and Mary in England, Francis II. and Mary in Scotland, William and Mary in the British dominions, will readily occur as illustrations of this remark (*t*).

CCLXXV. *Successio ab intestato* (Succession) is also among the means of national acquisition. It is true that the rules of Civil Law framed for individuals are not, strictly speaking, applicable to nations (*u*). The death of a nation

(*r*) Koch, *Tabl. des Rev.* t. i. p. 316.

(*s*) Günther, vol. ii. p. 99.

(*t*) Günther, *ib.* pp. 100–103, and valuable notes.

(*u*) Grotius, l. ii. c. ix.

would be the dissolution of its social and political elements, and there would be no next of kin to succeed to the property which it had occupied while its corporate character remained. But as States, represented by monarchs, have been allowed to acquire property through the marriage of their sovereign, so have they been allowed to acquire property through his personal relation, as next of kin, to the sovereign of another territory in which the government is hereditary, upon the decease of that sovereign without any nearer relative. The question has been much discussed by writers on the Law of Nations and upon the general principles of Jurisprudence—whether the succession of the next of kin to an intestate person be a law of Nature, or merely an institute of Civil Law (*x*).

\* It is certain, however, that the death of the ruler of the State, without making any testamentary provision for his succession, even in countries where the power to do so is legitimately vested in him, can give no right to any foreign nation to take possession of the territory; for in that event, the power of disposition devolves upon the body corporate of the State. James I. of England succeeded to the throne of this country, partly by the nomination of the dying Elizabeth, and partly by right of his descent. The whole question of succession—whether through *Agnates*, relations on the male side, or *Cognates*, relations on the female side—is pro-

(*x*) *Grotius*, l. ii. c. vii. s. iii. p. 277. Grotius is among the supporters of the former opinion, founded on the presumption that the deceased person could not have intended his property to have been lost, but must have wished it to be given to those who were dearest—that is, according to all presumption, those who were nearest—to him. His commentator, Cocceius, thinks that the rule of succession in Europe arises from the necessity of the case; viz. that all land being occupied by somebody, the relations of the deceased would be without support if they did not succeed to his prospects. Sam. Cocceii *Introd. ad Henr. Cocceii Grot. illustr. diff. proem. x. ss. 12 et 13*: “Cum rebus terræ in universum occupatis nihil amplius supersit quod occupari possit, vel non quantum sufficit; homines occupatis rebus nati succedunt in occupationem parentum.”—Günther adopts this reasoning, vol. ii. p. 103.

*Puffendorf*, l. iv. c. xi. *De Success. ab Intestato*.

perly and exclusively a matter to be settled by the constitutional law of the country itself. How far, at least, any exception may exist to this rule in the right of INTERVENTION which the legitimate apprehension of danger may confer on other nations, will be discussed in the subsequent pages of this work. Nor can it be denied that some of the bloodiest European wars have arisen out of disputed succession to the government of kingdoms. No educated person is ignorant of the wars of England, under the Edwards and Henries, for the crown of France,—or of those horrible thirty years of warfare, which originated in the claim of the Elector Palatine of Bohemia, and which desolated Germany till the Treaty of Westphalia,—or of the general distraction and prolonged disturbance of the peace of Europe which arose out of the disputed succession to the House of Spain, and was closed by the Treaty of Utrecht.

The claim of the sovereign of another nation is rarely without the pretext of support from a party in the country which is the object of his ambition. When Philip II. of Spain seized on Portugal, claiming through a young daughter of King Henry, with whom the male line became extinct in 1580, to the exclusion of the House of Braganza, allied to an elder daughter, he was supported by the alleged free choice of the magnates of Portugal. The unfortunate Elector Palatine was supported in his pretensions to the kingdom of Bohemia by the choice and approbation of the States of the realm.

A large party, both in Great Britain and Ireland, were favourable to the claims of the Pretender during the reign of the first two Georges. A similar remark is applicable to the Pretenders to the thrones of France, Spain, and Portugal in our own times.

CCLXXVI. *Testamentary disposition* has unquestionably been a mode of territorial acquisition by nations, in the persons of their governors. But it can only be so when the kingdom is proprietary—a state of things which it has been already observed cannot be said now to exist

in Europe; not even, it is presumed, in Russia; though it might happen that the nation adopted and ratified the will of the deceased sovereign. The famous will of Charles II. of Spain, made (October 2, 1700) under the superintendence of the Cardinal Portocarrero his minister, and after receiving the advice of the Pope and of the most learned theologians—that will by which he bequeathed dominions upon which the sun never set to the second son of the Dauphin of France—is a remarkable instance of the exercise of this power, but one which is not likely to be imitated.

In truth, the only sound rule upon the whole subject of these modes of acquisition, either *testamento* or *ab intestato*, which can find its place in a work of International Jurisprudence, is this, that the voice of the people of the country, concerning whose government the dispute arises, should, through the legitimate channels of its own constitution, decide the question for itself in such a manner as not to threaten the security of other nations.

Conquest, fortified by subsequent treaty, gives a valid International title to territory; but this subject belongs to a later part of this work.

The case of the acquisition of a portion of the dominion of Saxony by Prussia (*y*), in 1814, is so anomalous, that it is impossible to class it under any known or legitimate category of International Acquisition. If it belong to any, it is to that of Conquest and Treaty just mentioned; but, in truth, it belongs to the class of transactions of which we must say,

Non ragioniam di lor, ma guarda e passa (*z*),

with, however, a strong protest that no axiom of International Law is to be deduced from an act, which seems, upon all the principles of that jurisprudence, indefensible.

(*y*) See Talleyrand's admirable *Mémoire raisonné* on this subject, *Traité de Dipl.*, *De Gaden*, t. iii. p. 146.

(*z*) *Dante, Inferno*, iii. 51.

## CHAPTER XV.

## ACQUISITION OF RIGHTS.

CCLXXVII. THE property of a State may not only be alienated, but may also be subjected to *obligations* and *services* in favour of another State; as the property of an individual may be burdened and encumbered in favour of another individual (*a*). This may, of course, happen in various ways; but it most frequently occurs when a State, having contracted pecuniary obligations towards another State, has mortgaged its revenues, or pledged a portion of its territory, as a security for the payment of its debts. Thus, among other instances, the United Provinces of the Netherlands hypothecated Vlissingen, Rameken, and Briel to England, in 1585. Denmark, in 1654, hypothecated the province of Holland to Sweden, as a security for the peace then concluded (*b*). Weimar appears to have been pawned, so to speak, to Mecklenburg in 1803 (*c*), and Corsica by Genoa to France in 1768.

We are not speaking now, it will be observed, of debts contracted by States to Individuals (a question to be dealt with hereafter), but to other States.

CCLXXVIII. It sometimes happens that the debt between the Government of one country and the Government

(*a*) *Günther*, vol. ii. pp. 153-161.

*Vattel*, l. ii. c. ii. s. 80.

*Heffter*, p. 133, s. 71.

*Klüber*, vol. i. s. 140.

(*b*) *Günther*, vol. ii. p. 153.

*Dumont*, *C. dipl.* t. v. s. i. p. 454.

(*c*) *Martens*, *Rec.* vol. viii. s. 54. *Ib.* p. 229.

See, too, *Schmauss*, *C. J. G.* vol. ii. pp. 1140, 1150.

of another is made the subject of a treaty. Sometimes the Government of a third Power guarantees the payment of the debt (*d*). In 1776 Russia guaranteed a loan of 500,000 ducats contracted by the Polish Government.

By the 97th article of the Treaty of Vienna (1815), the maintenance of the credit and solvency of the establishment called the *Mont-Napoléon*, at Milan, was especially provided for.

CCLXXIX. States are sometimes placed in such physical relations to each other, that some limitations of the abstract rights of each *necessarily* flow from their natural relations, or from the reason of the thing. Thus a State is bound to receive the waters which *naturally* flow within its boundaries from a conterminous State. This obligation belongs to the class of “*servitutes juris gentium naturales*,” and here the provisions of the Digest (*e*) and Institutes may be said to be identical with those of International Law (*f*).

CCLXXX. A State may *voluntarily* subject herself to obligations in favour of another State, both with respect to persons and things, which would not *naturally* be binding upon her. These are “*servitutes juris gentium voluntariæ*” (*g*).

In the language of Jurisprudence, when a thing is subject to the exercise of a right by a person who is not the master

(*d*) *Vattel*, l. ii. c. xvi. ss. 235–261. *Vide post*, vol. ii. part v. ch. vi., vii. and viii.

*Klüber*, ss. 155–157, n. d.

*Günther*, vol. ii. pp. 243–254.

(*e*) “Semper hæc est servitus inferiorum prædiorum ut *natura* profluentem aquam excipiant.”—*Dig.* xxxix. t. iii. l. s. 22.

(*f*) *Heffter*, s. 43: “Worauf sich unbedenklich auch die Vorschriften des römischen *Weltrechtes* anwenden lassen.”

(*g*) *J. N. Hertius*, in diss. de servitute naturaliter constituta cum inter *diversos populos*, tum inter ejusdem reipublicæ cives (*Prolegom.* s. 3, in ejusd. Comment. et Opercul. v. ii. t. iii. p. 66), defines *servitus* as “jus in re aliena, alteri a natura constitutum, cujus vi et potestate dominus istius rei ad alterius utilitatem, aliquid pati aut non facere in suo tenetur.”—*De necessitate et usu Juris Gentium, etc.* *Wieland et Foerster*, Lipsiæ, s. xvi p. 37.



or proprietor, it is said *to serve* (*res servit*) or yield *service* to that other person (*h*).

CCLXXXI. The doctrine of *Servitus* occupies an important place in the Roman Law; and in some shape, and under some appellation or other, exists of necessity in the jurisprudence of all nations (*i*). This obligation to service constitutes a right in the obligee or the person to whom it is due, and it ranks among the "*jura in re*," while it operates as a diminution and limitation of the right of the proprietor to the exclusive and full enjoyment (*libertas rei*) of his property (*j*).

According to the Roman Law, the *Servitus* consisted either—1, in not doing something (*in non faciendo*), and was negative (*servitus negativa*); or, 2, in suffering something to be done (*in patiendo*), and was affirmative (*servitus affirmativa*): but it could not consist in the obligation *to do* something (*in faciendo*). Not that the owner of a thing might not be obliged to do something in relation to that thing, for the benefit of another person; but that this obligation assumed a technically different character, and was not a "*jus in re*" (*h*).

(*h*) *Dig. viii. passim.*

*Instit. ii. 3.*

*Cod. iii. t. 34.*

*Domat. l. i. t. 12, s. 1.*

*Savigny, Recht des Besitzes, fünfter Abschnitt, p. 575.*

*Mackeldey, Lehrbuch des R. R. s. 274 u. s. w.*

*Schilling, Pandekten-Recht, s. 446 u. s. w.*

*Puchta, Instit. s. 252.*

(*i*) "Aussi les servitudes ont-elles été reconnues partout où les hommes se sont fixés d'une manière permanente en formant des associations durables."—*Ahrens, Philosophie du Droit*, p. 324.

"When a thing or property was free from all *servitus*, it was called *res optima maxima*."—*Dig. l. t. xvi., 90, 169.*

*Cicero, de Lege Agrar. iii. 2.*

(*j*) "Cum quis jus suum diminuit, alterius auxit, hoc est servitutem ædibus suis imposuit."—*Dig. xxxix. t. i. 5, s. 22.*

(*k*) "Servitutum non ea natura est ut aliquid faciat quis (veluti viridaria tollat, aut ameniorem prospectum præstet, aut in hoc ut in suo pingat); sed ut aliquid patiatur aut non faciat."—*Dig. viii. t. i. 15, s. 1.*

It is not, however, necessary to examine with greater minuteness the provisions of the Roman Law upon this subject, though some mention of the general doctrine was a necessary preface to the application of it to the case of States; for some States, as well as individuals, have been and are entitled to exercise rights of this description, and others therefore are and have been subject to the obligations which correspond to them.

CCLXXXII. The *servitutes juris gentium* must, however, be almost always the result either of certain prescriptive customs, or of positive convention. The entire liberty which each State naturally possesses over its own property cannot be curtailed upon presumption. The *jus in re aliena* is a derogation from the general principle of law, and requires, as a special and extraordinary right, the strictest proof of its existence.

CCLXXXIII. History furnishes many examples of these *servitutes voluntariæ*, both as to persons and things. As to *persons*, the stipulations of various Treaties between England and France provide that the Stuart Pretender should not be permitted to reside in France (*l*). And when Spain confirmed by Treaty the acquisition of Gibraltar to England, she stipulated that neither Moors nor Jews should be allowed to reside there (*m*).

As to *places*, there are various instances of *servitutes*, both negative and affirmative, but chiefly of the latter description. Of the *negative* kind was the engagement of France, the subject once of so much anxiety and so many conventions, that the port and fortifications of Dunkirk should be destroyed (*n*). British and Dutch Commissioners were empowered by Treaty to superintend the execution of these demolitions, and though ejected in time of war, they returned

(*l*) *Treaty of Utrecht* (1713), between France and England, *Art. 4*.

(*m*) *Treaty of Utrecht*, between Spain and England, *Art. 10*.

(*n*) *Traité d'Utrecht* (1713), *Art. 9*.

*Traité de la Haye* (1717), *Art. 4*.

with the restoration of peace, and were only finally withdrawn, in compliance with the provisions of the Treaty of Versailles, 1783 (o).

By the Treaty of Paris, 1814 (p), it was stipulated that Antwerp should be an *exclusively* commercial port; and the stipulation was renewed by the Treaties of 1831 and 1839, which erected Belgium into a separate kingdom.

By the same Treaty of 1831 (q), it was stipulated, *negatively*, that the fortresses of Menin, Ath, Mons, Philippeville, and Marienburg should be demolished before December 1, 1833; and *affirmatively*, that the other Belgian fortresses should be kept in repair by the King of the Belgians.

At one time Holland insisted that the Ostend East India Company, founded in 1723, and abolished by the Treaty of Vienna in 1731, was under a *servitus non navigandi* (r).

The Treaty of Vienna (1815), which reinstated the Pope in the possession of the Marches, Camerino, Beneventum, Pontecorvo, and the Legations of Ravenna, Bologna, and Ferrara, on the right bank of the Po, subjected his Holiness at the same time to the *servitus* of suffering Austrian garrisons "dans les places de Ferrare et Commachio."

To cite one more instance. In 1856 (March 30), by a Convention between England, France, and Russia, the latter Power declared "that the Aland Islands shall not be fortified, and that no military or naval establishment shall be maintained or erected there" (s).

(o) Koch, *Hist. des Tr.* vol. i. pp. 333-4. See, too, the Treaties of Radstadt and Baden between France and the Emperor of Germany, *Arts.* 5, 8, 9.

(p) *Art.* 15.

(q) *Art.* 1.

(r) *Klüber*, s. 133, n. c.

*Omnipeda*, tit. ii. 600.

(s) *Ann. Reg.* 1856, p. 321.

## CHAPTER XVI.

EXTINCTION OF DOMINION (*a*).

CCLXXXIV. As Dominion is acquired by the combination of the two elements of *fact* and *intention*, so, by the dissolution of these elements, or by the manifestation of a contrary fact and intention, it may be extinguished or lost (*b*).

In this case the dominion is lost, actually or by presumption, with the consent of the State which loses it.

CCLXXXV. The title of Prescription in another State is often, though not necessarily, founded on the *presumed* dereliction of the possession by the original owner.

It must be borne in mind that this presumption, like all others, is liable to be repelled by proof of sufficient strength (*c*), that is, by evidence of a state of facts wholly inconsistent with such presumption. On the other hand, it should be observed that there is a conduct, and that there are acts on

(*a*) *Grotius*, l. ii. c. ix.—*Quando imperia vel dominia desinunt*, l. iii. c. ix. 9.

*Martens*, t. ii. l. ix. pp. 340–4.

*Günther*, vol. ii. p. 213.

*Heffter*, 72.

*Mühlenbrück*, l. ii. c. iii. s. 270.

(*b*) “Fere quibuscunque modis obligamur, iisdem in contrarium actis liberamur; quum quibus modis acquirimus, iisdem in contrarium actis amittimus. Ut igitur nulla possessio acquiri, nisi animo et corpore potest, ita nulla amittitur, nisi in qua utrumque in contrarium actum est.”—*Dig. L. t. xvii. 153; xli. t. ii. 8.*

(*c*) “Quia vero tempus memoriam excedens quasi infinitum est moraliter, ideo ejus temporis silentium ad rei derelictæ conjecturam semper sufficere videbitur, nisi *validissimæ* sint in contrarium rationes.”—*Grotius, de J. B. l. ii. c. iv. s. 7.*

the part of a State, which must be construed as an abandonment of her previous rights. For instance, a State may make herself a party to some convention upon another matter, but in which the possession or right originally belonging to her is indirectly, though of necessity, treated as belonging to the claimant by prescription; and such convention being concluded without any reservation on the part of the nation, would be very strong evidence of the abandonment of her right.

Again, if a nation suffer other nations in their mutual arrangements to deal with the right of possession in question as belonging to one of them, and makes no protest in favour of her claims, she must be held to have acquiesced in the transaction. An individual may indicate his acquiescence by his words or by his deeds. "Recusari hæreditas non tantum  
"verbis, sed étiam re potest, et alio quovis indicio voluntatis" (d) is the doctrine of the Roman Law; and upon it Grotius (e) remarks, "Sic si is qui rei alicujus est dominus,  
"sciens cum altero eam rem possidente tanquam cum domino  
"contrahat, jus suum remisisse merito habebitur: quod cur  
"non et inter reges locum habeat, et populos liberos nihil  
"causæ est." And again: "Venit enim hoc non ex jure civili  
"sed ex jure naturali, quo quisque suum potest abdicare, et  
"ex jure naturali præsumptione, qua voluisse quis creditur  
"quod sufficienter significavit: quo sensu recte accipi  
"potest quod Ulpianus dixit, juris gentium esse acceptilationem" (f).

Heineccius, in his Commentary on Grotius, expresses concisely the same doctrine: "inter gentes loco signi est patientia scientia" (g).

It is indeed true that, according to Grotius, silence cannot be construed as an assent, unless it be "scientis et libere

(d) *Dig.* xxix. t. ii. 95.

(e) *L.* ii. c. iv. s. 4.

(f) *Ib.* *Dig.* xlv. t. iv. 8.

(g) *Prælect.* l. ii. c. iv. s. 4. See, too, *Mably, Droit public*, t. ii. pp. 21, 22.

“volentis;” but he adds that “temporis in utrumque magna vis est;” and in fact these conditions are presumed after the lapse of time (*h*).

CCLXXXVI. The practice of nations confirms this theory: they have frequently entered protests (*i*) in favour of their alleged rights upon the conclusion of Treaties in which these rights were expressly, or by implication, negatived. It is hardly necessary to add, that a nation, who is herself a party to such a Treaty, without making any protest, has unquestionably abandoned her rights. The Congress of *Aix-la-Chapelle* (1748) was the last in the eighteenth century at which these protests were made. Thus, the Pope has perpetually protested, from the Treaty of Westphalia to the Congress of Vienna, against all Treaties recognizing or confirming the confiscation of Church property effected at or since the time of the Reformation (*j*).

(*h*) *Grotius* (*de Jure Belli*, l. ii. c. iv. ss. 5, 6) says: “Sed ut ad derelictionem præsumendam valeat silentium duo requiruntur, ut silentium sit scientis, et ut sit libere volentis; nam non agere nescientis, caret effectu, et alia causa cum apparet, cessat conjectura voluntatis.

“Ut hæc igitur duo adfuisse censeantur, valent et aliæ conjecturæ: sed temporis in utrumque magna vis est. Nam primum fieri vix potest, ut multo tempore res ad aliquem pertinens non aliqua via ad ejus notitiam perveniat, cum multas ejus occasiones subministret tempus. Inter præsentés tamen minus temporis spatium ad hanc conjecturam sufficit, quam inter absentes, etiam seposita lege civili. Sic et incussus semel metus durare quidem nonnihil creditur, sed non perpetuo, cum tempus longum multas occasiones adversus metum sibi consulendi, per se, vel per alios suppeditet, etiam exeundo fines ejus qui metuitur, saltem ut protestatio de jure fiat, aut, quod potius est, ad iudices aut arbitros provocetur.”

Κάτοχον καὶ βέβαιον τὴν κτήσιν πεπονηκότος τοῦ χρόνου.—*Dionys. Halicarn.*, c. ix. t. ii. p. 155.

Χρόνος γὰρ ἐνμαρῆς θεός,

according to the remarkable expression of Sophocles (*Electra*, 179).

(*i*) *Mably*, *Droit public*, t. i. pp. 104, 342; t. ii. pp. 43, 193.

*De Rayneval*, *Instit. du Droit de la Nature et des Gens*, l. ii. c. ix. s. 2.

(*j*) *Koch*, *Hist. des Tr.* t. i. p. 316.

*Mably*, t. i. p. 143; t. ii. pp. 50, 130-9, *præsertim* (for History of the Renunciation of France in the Treaties of Utrecht), p. 148.

*Wheaton*, *Hist.* p. 87.

In 1814 (*k*) the King of Saxony published an admirable protest against the dismemberment of his kingdom. And at the Congress of Vienna (1815) the Pope and Gustavus IV., ex-King of Sweden, delivered protests (*l*).

CCLXXXVII. This dereliction of property is, however, often not left, and where it is possible never should be left, to the inferences of legal presumption. The solemn renunciation of territory and of rights by a State is one of the most important subjects of both Public and International Jurisprudence. Memorable instances of their importance are to be found in the Treaties of Utrecht. In these Treaties the renunciations of the Emperor of Germany, the King of France, and the King of Spain established the separation of the Crowns of France and Spain as a fundamental rule of European International Law, and severed Belgium, Milan, and Naples from the Spanish monarchy.

The States or State interested in the renunciation must take care that it be ratified by the Constitutional Authorities of the renouncing kingdom. We may close this subject with the remark of Mably: "Tous les peuples sentent la nécessité des renonciations pour établir entre eux la sûreté, l'ordre, et la paix; ne doit-il pas être absurde de douter de leur validité?" (*m*).

CCLXXXVIII. Another mode of extinguishing dominion is, as we have seen, by voluntary transfer of the possession; but it is important to observe, that if a part of a territory be alienated, it carries with it to the new owner all the obligations and debts by which it was previously bound; here, as in most cases, the principle of the Roman Law being applicable:—"Id enim bonorum cujusque esse intelligitur quod æri alieno superest" (*n*). When property has been granted

(*k*) *Garden, Tr. de Dipl.* t. iii. p. 205, contains the Protest at length. See, too, p. 146—the *Mémoire raisonné*.

(*l*) *Koch*, t. iii. p. 500.

(*m*) *Droit public*, t. ii. p. 140.

(*n*) *Dig.* xlix. t. xiv. 11; l. t. xvi. 125.

under a condition which has not been fulfilled on the part of the grantee, then *redit dominium ipso jure* to the grantor. And in this case it appears consonant to justice that the property should be restored to the grantor with its intermediate fruits and revenues, and without the burdens or obligations imposed on it during its temporary ownership, there being, as Jurists say, a *dominii resolutio ex tunc* (o).

CCLXXXIX. The doctrine of *Postliminium* (p), in the case of States, is borrowed from the Roman Law, and belongs to the time of Peace as well as War, though properly and chiefly to the latter, where it will be further discussed.

The *jus postliminii*, in the sense in which it is now about to be used, means the right of being reinstated in property (q)

(o) "Amittimus etiam dominium, quod sub resolventi conditione acquisiveramus, si conditio impletur. Hoc autem duobis modis fieri potest. Aliquando enim ita resolvitur jus nostrum, ut res nunquam nostra fuisse videatur, tum onera ei a nobis imposita evanescent, et res cum fructibus et omni causa restituenda est. Hæc rescissio accidit, quoties sub casuali conditione res nobis alienata fuerat, veluti si ager sub lege commissoria emptus, ob pretium non solutum inemptus sit. (Exempla extant in fr. iii. s. iii. D. 18, 2 (de in diem addictio.); fr. iii. D. 20, 6 (quibus mod. pign. vel hyp. solv.), c. iv. C. 4, 54 (de pactis inter emt. et venditor.) Redit dominium ipso jure.) Aliis in causis revocatio dominii in præteritum trahenda non est; quo casu res sine fructibus, sed cum oneribus ei a nobis impositis restitui debet. (Exempl. in fr. iii. in f. D. 20, 6 (tit. cit.), fr. iii. D. 18, 6 (de rescind. vend.), c. 2, C. 4, 54 (tit. cit.), Dominium ipso jure non redit, sed tenemur ad rem veteri domino tradendam.) Hodierni illam dominii resolutionem *ex tunc*: hanc vero *ex nunc* appellare consueverunt. Hæc maxime tum obtinet, cum res sub potestativa conditione nobis abalienata erat."—*Warnkönig, Instit. Jur. Rom. Privati*, l. ii. c. ii. tit. viii. s. 378.

(p) *Grotius*, l. iii. c. ix., *De Postliminio*.

"Dictum est autem *postliminium* a *limine* et *post*; unde eum, qui ab hostibus captus, in fines nostros postea pervenit, *postliminio* reversum recte dicimus. Nam *limina* sicut in domibus finem quendam faciunt. Sic et imperii finem *limen* esse veteres voluerunt. Hinc et *limes* dictus est, quasi finis quidam et terminus; ab eo *postliminium* dictum, quia eodem *limine* revertebatur, quo amissus fuerat."—*Institut.* l. i. tit. xii. *Quibus modis jus patriæ potestatis solvitur*, s. 5.

*Bynkershoek*, Q. J. P. l. i. c. xvi., *de Jure Postliminii varia*.

(q) *Grotius*, l. ii. c. x., *de obligatione quæ ex dominio oritur*; or, according to Barbeyrac's most correct translation, "De l'obligation que le droit de propriété impose à autrui, par rapport au propriétaire."



and rights which have been accidentally lost or illegally taken away. They must, however, have been at one time *actually*, and not *theoretically* (*r*), possessed,—as was rightly determined in the case of Belgium, which has been already mentioned (*s*).

CCXC. When property, or rights, have been so lost and taken away, it should seem to be the better opinion of jurists, that even a *bona fide* possessor and purchaser must restore them to the rightful owner (*t*),—and, moreover, without compensation for the expenses which he (the *bona fide* possessor) may have incurred in purchasing it. He is not even, according to many jurists, following the doctrines of the Civil Law, entitled to the *εὑρετρα*, the *inventionis præmia* (*u*), except, indeed, in cases in which the rightful owner himself must have paid for the recovery of the goods of a friend from the possession of an enemy (*x*). Salvage on recapture is founded on this principle, and is a part of the Maritime Law, not only of our own, but of all civilized nations. Property recovered from robbers by sea or land falls of course under the same principle.

CCXCI. Upon the question, however, whether the *bona fide* possessor is bound to restore (*y*), not only the possession,

(*r*) *Grotius*, l. iii. c. ix., *de Postliminio*.

(*s*) *Wheaton's Hist.* pp. 547–555.

(*t*) *Grotius*, l. ii. c. x. i. 5, *de Obligatione quæ ex dominio oritur*: “Nam ad domini naturam nihil refert ex gentium an ex civili jure oriatur: semper enim secum habet quæ sibi sunt naturalia, inter quæ est obligatio cujusvis possessoris ad rem domino restituendam. Et hoc est quod ait Martianus *jure gentium* condici posse res ab his qui non ex justa causa possident.”

(*u*) *Grotius*, l. ii. c. x.: “Quid ergo, si *εὑρετρα* (id est, inventionis præmia) quæ dicunt, petat? Nec hic videtur furtum facere, etsi non probe petat aliquid.”—*Dig.* xlvii. t. ii. 43, 9, *de Furtis*.

(*x*) *Heineccius* indeed thinks this practice “ex regula honesti,” but not “ex regula justii;” because no owner ought “res suas *bis* emere.”—*Heinecc. in Grot.* l. ii. c. x. 9.

(*y*) “Thou shalt not see thy brother's ox or his sheep go astray, and hide thyself from them: thou shalt in any case bring them again unto thy brother.

“And if thy brother be not nigh unto thee, or if thou know him not,

but the intermediate fruits and profits which he has derived from it, there is some difference of opinion. Grotius and Puffendorf(z) hold that he must restore so much of the fruits of the property as have increased his fortune, though not the value of that which has been consumed by him upon his actual necessities. They found this maxim upon a rule to be found in the Digest: “*Jure naturæ æquum est neminem “cum alterius detrimento et injuria fieri locupletiores”*”(a). The rigid adoption of this rule has led them both into considerable perplexity, and into the necessity of allowing many exceptions from it, chiefly founded on the doctrine of obligations from implied contracts (*ex quasi contractu* (b)). It is difficult not to agree with Barbeyrac, that the rule cited is not necessarily applicable to any cases of this description (c): “Mais” (he says) pour ne pas l’étendre trop loin, il faut “considérer si celui qui profite aux dépens d’un autre n’a “pas un droit de faire ce profit. Car s’il en a un droit, “alors on voit bien que c’est tant mieux pour lui, et tant pis “pour l’autre” (d). The maxim cited from the Civil Law may indeed be opposed by another derived from the same source: “*Bona fides tantundem possidenti præstat, quantum veritas, “quoties lex*” (that is, some particular law) “*impedimento “non est*” (e), and that the true rule of International Law is, that the peaceable enjoyment of an honest possessor is to

then thou shalt bring it unto thine own house, and it shall be with thee until thy brother seek after it, and thou shalt restore it to him again.”—*Deuteronomy* xxii. 1, 2.

(z) *Grotius*, l. ii. c. x.

*Puffendorf*, l. iv. c. 13.

(a) *Dig.* l. t. xvii. cvi. And so Cicero says: “*Detrahere igitur aliquid alteri, et hominem hominis incommodo suum augere commodum, magis est contra naturam, quam mors, quam paupertas, &c.*”—*De Offic.* l. iii. c. v.

(b) *Grotius*, *ib.*, and *Heineccii Prælect.*:—“*Et quæ sunt alia hujus generis exempla. Innumera enim in jure universo, maxime in materia de quasi contractibus passim occurrunt.*”

(c) It is the doctrine, however, of English Law.

(d) *Barbeyrac* on *Grotius*, t. i. l. ii. c. x. p. 391 (note 4).

(e) *Dig.* l. t. xvii. 136.

be considered as a kind of *interregnum* which has interrupted the power of the true proprietor, but ensures to the putative proprietor the fruits of his management while he was in full authority (*f*).

CCXCII. Günther seems to admit the position of Grotius, but asserts that the honest possessor may set off the costs of the improvements which he has effected, against the emoluments which he has received (*g*). Heffter takes, in effect, the same view of the matter as Barbeyrac, but without referring to him (*h*). Heffter founds his opinion upon the position, that the silence of the true proprietor, during the time the honest possessor was in authority, ought to secure to the latter his gains; and Barbeyrac acutely observes, what Thomasius, who followed in the wake of Grotius and Puffendorf, is obliged in his Commentary on Huber's work (*i*) (*De Jure Civitatis*) to admit, "que, quand il s'agit de voir si un possesseur de bonne foi s'est enrichi par la possession de la chose même, ou par la jouissance des revenus qui en proviennent, c'est un examen sujet à des difficultés infinies, et dont on ne peut presque venir à bout."

CCXCIII. From the practice of nations with respect to this matter in time of peace, but little aid is to be borrowed for either argument. The 13th Article, however, of the Peace of Ryswick, in 1697, though it may be said more properly to refer to indemnification due from a wrong-doer to a lawful owner, may be mentioned here: "Et in quantum, per auctoritatem Domini Regis Christianissimi Dominus Rex Magnæ Britanniae impeditus fuerit, quominus frueretur redditibus, juribus et commodis tam principatus sui Aransionensis quam aliorum suorum Dominiorum, quæ post conclusum Tractatum Neomagensensem, usque ad declarationem præsentis belli

(*f*) Barbeyrac on Puffendorf, *de Jure Nat. et Gent.* l. iv. c. xiii. s. 3.  
*Ibid.* on Grotius, *de Jure B. et P.* l. ii. c. x. s. 2.

(*g*) Günther, vol. ii. p. 214.

(*h*) Heffter, 73, n. 1.

(*i*) Barbeyrac on Grotius, l. ii. c. x. p. 391 (notis).

“sub dominatione prædicti Regis Christianissimi fuerunt,  
 “prædictus Dominus Rex Christianissimus Regi Magnæ  
 “Britanniæ restituit et restitui efficiet realiter cum effectu  
 “et cum interesse debito, omnes istos redditus, jura et com-  
 “moda secundum declarationes et verificationes coram dictis  
 “Commissariis faciendas” (*k*).

CCXCIV. Property may be taken, without consent, from an individual by an act of the law, and a valid title conveyed to another owner; so by conquest—*jure victoria*—followed by treaty, property may be taken from one State and conveyed to another; but this will be discussed at greater length in another part of this work.

CCXCV. Property may also become legally extinct by suffering a change of character, by being placed among things *extra commercium*, as will be explained in the next chapter.

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(*k*) *Schmauss*, vol. ii. p. 1113.

## CHAPTER XVII.

## SLAVES AND THE SLAVE TRADE.

CCXCVI. THERE is a kind of property which it is equally unlawful for States as for Individuals to possess—property in men.

A being endowed with will, intellect, passion, and conscience, cannot be acquired and alienated, bought and sold, by his fellow beings, like an inanimate or an unreflecting and irresponsible thing (*a*).

CCXCVII. The Christian world has slowly but irrevocably arrived at the attainment of this great truth; and its sound has at last gone out into all lands, and its voice into the ends of the world (*b*).

International Law has for some time forbidden the captive of war to be sold into slavery. Of late years it has made a further step; it now holds that the colour of the man does not affect the application of the principle. The black man is no more capable of being a chattel than the white man. The negro and the European have equal rights; neither is

(*a*) "Si vinxero hominem liberum ita ut eum possideam, an omnia quæ is possidebat, ego possideam per illum? Respondit si vinxeris hominem liberum *eum te possidere non puto*; quod quum ita se habeat multo minus per illum res ejus a te possidebuntur; neque enim rerum natura recepit, ut per eum aliquid possidere possim quem civiliter in mea potestate non habeo."—*Dig.* xli. t. ii. 23, 2.

(*b*) "J'ai dit que d'après les principes de l'ancienne constitution romaine la propriété des objets les plus précieux, c'est-à-dire des choses *mancipi*, était censée provenir de l'Etat. Mais les chrétiens n'avaient jamais cru à cette hypothèse—dans leurs principes la terre appartenait à Dieu avec tout ce qu'elle contient."—*Troplong, de l'Infl. du Christ. sur le Droit civil*, p. 121.

among the "*res posite in commercio*," in which it is lawful for States or individuals to traffic (*c*).

Let us cast our eyes for a moment over the progress of International Jurisprudence upon this subject, for upon none has its melioration been more striking, or more advantageous to humanity. It may be considered, first, with respect to the Slavery of the White Man; and, secondly, with respect to the Dark or Coloured Man.

CCXCVIII. First, with respect to the White Man. Bynkershoek (*d*), in one of his last and ablest works, maintains, even in 1737, that as the conqueror may lawfully do what he pleases with the conquered, he may lawfully put him to death: but the right he admits has become obsolete. A corollary to this absolute power of life and death over enemies is the right, according to this author, of making them Slaves. A German potentate, he says, who served in the British Army in Ireland in 1690, is said to have ordered prisoners to be transported to America, for the purpose of being sold as Slaves, and to have been only deterred by a threat of the Duke of Berwick, Commander of the French Army in Ireland, that, as a retaliatory measure, he would send all his prisoners to the galleys in France. This practice he also admits to have become obsolete amongst *Christians* (*e*). But the Dutch, having themselves no slaves, except in Asia, Africa, and America, are, he observes, in the

(*c*) "*Regula illa juris naturalis, cognationem inter homines quandam esse a natura, ac proinde nefas esse alterum ab altero lædi.*"—*Grotius*, l. ii. c. xv. 5, i.

(*d*) The *Questiones Juris Publici* appeared in 1737, when the author was sixty-four years of age; he died in 1743. The doctrine referred to in the text is to be found in the third chapter of the first book.

"Item ea quæ ex hostibus capimus *jure gentium* statim nostra sunt: adeo quidem ut et liberi homines in servitutem nostram deducuntur: qui tamen, si evaserint nostram potestatem, et ad suos reversi fuerint, pristinum statum recipiunt."—*Instit.* l. ii. t. i. 17.

(*e*) "*Sed quia ipsa servitus inter Christianos fere exolevit, ea quoque non utimur in hostes captos.*"—*Ib.*

"Sic enim *jus gentium* de servitute captivorum in bello justo, in

habit of selling the Algerines, the Tunisians, and Tripolitans, whom they take in the Atlantic or Mediterranean, to the Spaniards as Slaves.

Bynkershoek certainly did not, by his rather faint acquiescence in the desuetude of the custom of making slaves, advance the march of this sound principle of International Law. Grotius had long ago declared (*f*) that Christendom had abolished this pretended right, as directly at variance with the doctrine of the Founder of their Religion, and remarked, with pious and just exultation, that reverence for the law of Christ had produced that effect for which the teaching of Socrates had laboured in vain. To this prohibition to make captives slaves, like the prohibition to poison the enemy's wells, may be applied his emphatic language with respect to another infamy,—the violation of women,—language which should never be forgotten by those who aspire to render any contribution, however humble, to the great fabric of International Law (*g*)—"Atque id inter Christianos observari par est, non tantum ut disciplinæ militaris partem, sed et ut partem juris gentium."

CCXCVIII. The present Emperor of Russia, soon

*ecclesia mutatum est, et inter Christianos id non servatur.*"—*Suarez, de Leg. ac Deo Legist.* l. ii. c. xix.

It is remarkable that the very able dissertations of *Suarez*, on Natural, Public, and International Law, are not noticed by Grotius.

See same reasoning for the enfranchisement of bondmen in England, *Sir Thomas Smith, Commonwealth of England*, p. 137.

(*f*) It is a noble passage, worthy of its illustrious author:—"Sed et Christianis in universum placuit, bello inter ipsos orto, captos servos non fieri, ita ut vendi possint, ad operas urgeri, et alia pati quæ servorum sunt: merito sane: quia ab omnis caritatis commendatore rectius instituti erant, aut esse debebant quam ut a miseria hominibus interficiendis abduci nequirent, nisi minoris sævitie concessione. Atque hoc a majoribus ad posteros pridem transiisse inter eos, qui eandem religionem profiterentur, scripsit Gregoras, nec eorum fuisse proprium qui sub Romano imperio viverent, sed commune cum Thessalis, Illyriis, Triballis, et Bulgaris. Atque ita hoc saltem, quanquam exiguum est, perfecit reverentia Christianæ legis, quod, cum Græcis inter se servandum olim diceret Socrates, nihil impetraverat."—*L.* iii. c. vii. s. 9.

(*g*) *Lib.* iii. c. iv. s. 19.

after his accession to the throne, abolished the status of serfdom throughout his dominions; and in his recent acquisitions in Central Asia, has abolished slavery and the slave trade.

CCXCIX. The successful efforts made by Christian Powers to emancipate the *white* Christian from the slavery to which the Infidel Powers of the Levant had too frequently consigned them, seem to claim some notice in this place.

Till the beginning of the present century specific Treaties were constantly concluded between the European and Barbary Powers, binding the latter to abstain from piratical depredations, to restore prisoners, and to conform to the usages of the civilized world. But it was not till after the pacification of the world in 1815 (*h*) that Great Britain bestirred herself to the accomplishment of that glorious enterprise which must for ever entitle her to the gratitude of Christendom. Early in the spring of 1816, Lord Exmouth, the British Commander-in-Chief in the Mediterranean, received, amongst other instructions, the order to procure, if possible, a general abolition of Christian slavery in Barbary.

Lord Exmouth, acting in obedience to these instructions, succeeded in extracting a promise from the Beys of Tunis and Tripoli that they would not for the future make slaves of prisoners of war, but would conform to the practice of European nations (*i*). The Dey of Algiers pretended that he could not join in this promise without the permission of the Sultan, whose subject he was. Shortly afterwards, outrages were committed at Algiers upon the British Consul, and at Bona upon the British flag, and abominable cruelties perpetrated upon divers crews of fishing-boats from the

(*h*) *Ann. Reg.* 1816, vol. lxxxv. c. ix. p. 97; *Appendix*, p. 230, &c.

(*i*) *De M. et de C.* t. iii. p. 263: "Déclaration du Bey de Tripoli, en date du 29 avril 1816, portant que l'esclavage des prisonniers de guerre est aboli. Dans les mêmes termes par le Bey de Tunis, 17 avril 1816."



ports of Italy. The consequence of these atrocities, and of the Dey's refusal to acquiesce in the abolition of Christian slavery, was the ever-memorable bombardment of Algiers by the British fleet under Lord Exmouth, gallantly assisted by a Dutch squadron under Vice-Admiral Capellen, on August 27, 1816.

The destruction of nearly half Algiers and of the whole Algerine navy achieved a great triumph for civilization and Christianity.

The Dey consented—

1. To the abolition for ever of Christian slavery.
2. To deliver to the British Admiral all slaves in his dominions, to whatever nation they might belong, before the noon of the next day.
3. To deliver at the same time all money received for the redemption of slavery since the beginning of 1816.
4. To make full reparation and a public apology to the British Consul, as will be mentioned elsewhere.

In 1830 the French took possession of Algiers, and concluded with Tunis and Tripoli treaties (August 9 and 11, 1830) for the abolition of Christian slavery, and a conformity to the civilized usages of commerce and war.

In January 1846, the Bey of Tunis addressed a circular to the Consuls of Christendom, announcing the abolition of slavery throughout his kingdom—an act which surely shamed the slave-holding States of Christendom (*j*).

CCC. Secondly, with respect to the slavery of the Dark or Coloured Man. Is there really any difference in principle between the two cases? Can it ever have been a sound position of International Law that a rule of immutable justice and eternal right was rendered inapplicable by the complexion of the person, the region in which he dwelt, or the religion which he professed? At all events, was this ever a sound position of *Christian* International Law? The question, it must be admitted, has been answered in the

affirmative by the decision of Courts of Justice both in England and North America.

According to Lord Stowell, trading in Slaves was neither piracy nor *legally* (*k*) criminal. It was sanctioned by ancient admitted practice, by the general tenor of the laws and ordinances, by the formal transactions of civilized States, and by the doctrine of the Courts of the Law of Nations.

All this was undoubtedly true: but might not all these reasons have been urged at one time in favour of the practice of selling Christian captives into Slavery? Was there not a time when the practice of nations sanctioned the slaughter of captives by sword or poison, and the violation of women in time of war (*l*)? Is not, *pace tanti viri*, the real question whether, *if* the Slave Trade be a *crime*, any *usage*, however general, can alter its character? Are not Natural and Revealed Law the primary sources (*m*) of International Jurisprudence? and though it be true that much which they in the abstract simply *permit* (*n*) is limited or disallowed by the mutual practice of nations, could that practice sanction what

(*k*) *The Le Louis*, 2 *Dodson Adm. Rep.* p. 249. It should be observed that this judgment was delivered in 1817. It was in 1818 that the French law finally rendered the Slave Trade illegal.—*Koch, Hist. des Tr.* t. iii. p. 517.

See, however, also the case of *Madrazzo v. Willis*, 3 *Barnewall and Alderson Reports*, p. 353. See also *The Antelope*, 10 *Wheaton Reports*, p. 66.

(*l*) "Stupra in foeminas in bellis passim legas et permissa et impermissa; atque hoc posterius jus est gentium non omnium, sed meliorum."—*Grotius, de J. B. et P.* l. iii. c. iv. 19.

"Nec tempore ullo excluditur potestas occidendi tales servos, id est bello captos, quantum ad jus gentium pertinet; etsi legibus civitatum hic magis, illic minus adstringitur."—*L.* iii. c. iv. s. x. 2.

"Jus gentium, si non omnium, certe meliorum, jam olim est, ne hostem veneno interficere liceat."—*L.* iii. c. iv. s. 15.

It is true that Grotius says: "Sicut autem jus gentium permittit multa, eo permittendi modo quem jam explicavimus, quæ jure naturæ sunt vetita, ita quædam vetat permissa jure naturæ."—*L.* iii. c. iv. s. xv.; cf. l. iii. c. ii. 1; l. ii. c. xvii. s. xix.; l. iii. c. i. s. i.; l. ii. c. iii. s. x.

(*m*) See third chapter of this work.

(*n*) "Sed multa quæ natura permittit, jus gentium ex communi quodam consensu potuit *prohibere*."—*Grotius*, l. ii. c. iii. s. x. 3.

the Natural and Religious Law had *absolutely forbidden* (o)? Could a Municipal Law sanction homicide or adultery? When Grotius treats of the liability which *jure gentium* the goods of subjects incur of being seized by the enemy of their Sovereign, he observes that this liability is not imposed by a rule of Natural, but of International Law, which latter cannot, in this respect, be said to be at variance with, but rather additional to the former (p), “non autem hoc naturæ repugnat, ut non more et tacito consensu induci potuerit.” Can this be predicated of the Slave Trade? “No nation,” Lord Stowell says (q), “can privilege itself to commit a crime against the Law of Nations by a mere municipal regulation of its own.” Can nations collectively privilege themselves to commit a crime against the law of Nature and of Nature’s God? That it was a *crime*, Lord Stowell thought; for in a yet later judgment (r), the most questionable, perhaps, which he ever delivered, he said, “It is in a peculiar manner the crime of this country.”

Mr. Dana, in his learned and elaborate note (s), points out why, speaking technically and with reference to the practice of the Prize and Municipal Court, the case of *The Amédée*, in which Sir William Grant delivered in 1807 the judgment of the Lords of Appeal in Prize Causes, was not reversed, or rather contradicted, by Lord Stowell in the case of the *Le Louis* in 1817. But I think that the opinion of Sir William Grant (and a higher judicial authority can scarcely be cited) supports the general proposition that the Slave Trade must now be deemed a violation of International Law. The judgment is as follows :—

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(o) “Jeder Handel und Verkehr, welcher den allgemeinen Menschenrechten zuwiderläuft, ist geächtet. Niemand begibt ein Unrecht, wer ihn stört oder vernichtet. Dies ist das Gesetz des Sklavenhandels.”—*Heffter*, § 32.

(p) l. iii. c. ii. s. ii. 2.

(q) *The Le Louis*, 2 *Dodson Adm. Rep.* p. 251.

(r) *The Slave Grace*, 2 *Haggard Adm. Rep.* p. 128.

(s) *Dana's Wheaton*, p. 208.

“ This ship must be considered as being employed, at the  
“ time of capture, in carrying slaves from the coast of  
“ Africa to a Spanish colony. We think that this was  
“ evidently the original plan and purpose of the voyage,  
“ notwithstanding the pretence set up to veil the true  
“ intention. The claimant, however, who is an American,  
“ complains of the capture, and demands from us the re-  
“ stitution of property, of which, he alleges, that he has  
“ been unjustly dispossessed. In all the former cases of  
“ this kind which have come before this Court, the Slave  
“ Trade was liable to considerations very different from  
“ those which belong to it now. It had, at that time, been  
“ prohibited (so far as respected carrying slaves to the  
“ colonies of foreign nations) by America, but by our own  
“ laws it was still allowed. It appeared to us, therefore,  
“ difficult to consider the municipal regulations of a foreign  
“ State, of which this Court could not take any cognizance.  
“ But by the alteration which has since taken place the  
“ question stands on different grounds, and is open to the  
“ application of very different principles. The Slave Trade  
“ has since been totally abolished by this country, and our  
“ legislature has pronounced it to be contrary to the prin-  
“ ciples of justice and humanity. Whatever we might  
“ think, as individuals, before, we could not, sitting as judges  
“ in a British Court of Justice, regard the trade in that  
“ light while our own laws permitted it. But we can now  
“ assert that this trade cannot, abstractedly speaking, have a  
“ legitimate existence. When I say *abstractedly speaking*,  
“ I mean that this country has no right to control any  
“ foreign legislature that may think fit to dissent from this  
“ doctrine, and permit to its own subjects the prosecution of  
“ this trade ; but we have now a right to affirm that, *prima*  
“ *facie*, the trade is illegal ; and thus to throw on claimants  
“ the burden of proof that, in respect of them, by the  
“ authority of their own laws it is otherwise. As the case  
“ now stands, we think we are entitled to say that a claimant  
“ can have no right, upon principles of universal law, to

“claim the restitution in a Prize Court of human beings  
 “carried as slaves. He must show some right that has  
 “been violated by the capture, some property of which he  
 “has been dispossessed, to which he ought to be restored.  
 “In this case, the laws of the claimant’s country allow of  
 “no property such as he claims. There can, therefore, be  
 “no right to restitution. The consequence is, that the  
 “judgment must be affirmed” (t).

CCCI. At all events, the judgment of Lord Stowell in the *Le Louis* was delivered in 1817. Since that period International Law has, on this subject, advanced towards, if it have not yet reached, the elevation of Natural and Revealed Law.

The tide which had begun to flow when that eminent judge adorned the seat of International Justice has ever since set steadily onwards; and were he now alive, he must admit that the Slave Trade, tried by some of his own criteria, measured by “the legal standard of morality” (u), is *now* a violation of International Law, if it be not, strictly speaking, Piracy.

By general practice, by treaties, by the law and ordinances of civilized States, as well as by the immutable laws of eternal justice, it is now indelibly branded as a *legal* as well as a natural crime (x). I much rejoice to reckon among these States the United States of America. This great boon to suffering humanity would almost justify the remark that if, indeed, there were no other way to its attainment than the recent terrible civil war, even that event was not to be regretted. The abolition of slavery was certainly not

(t) *Acton Admiralty Reports*, p. 240.

(u) *The Le Louis*, p. 249.

See also *Madrazzo v. Willis*, 3 *Barnewall and Alderson Rep.* p. 353.

(x) *Koch, Hist. des Tr.* tom. iii. pp. 427, 432, 510, 533, 562, 570, contains a useful summary of the Slave Trade from its commencement in 1503 to 1815.

*Colquhoun's Civil Law*, p. 390, s. 413; p. 423, s. 476. *History of the British Slave Trade.*

the alleged cause or declared object of the war, but was due to the belligerent necessities of the Northern States (y).

CCCII. The eight Powers who signed the Treaty of Paris (1814) engaged to exert themselves for the suppression of this grievous sin, and by an additional article at the Congress of Vienna (z) bound themselves to take the most efficacious measures for securing the entire and definite

(y) Lord Clarendon, in his despatch of November 6, 1869, truly observed :

" But in answer to this, we ask how stand the actual facts? The war waged by the North against the South was not a war against slavery, but a war to maintain the Union. If the abolition of slavery had been its object, the Border States would have infallibly sided with the South, and the issue of the contest would probably have been very different. In his Inaugural Message in March 1861 President Lincoln said: '*I have no purpose directly or indirectly to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.*' And in a letter written and published by him in the second year of the civil war, the same President said: '*My paramount object in this struggle is to save the Union, and is not either to save or destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the coloured race, I do because I believe it helps to save this Union; and what I forbear, I forbear because I do not believe it would help to save the Union.*'"—*Ann. Reg.* 1869, pp. 294, 295.

(z) *De M. et de C.* t. iii. p. 476.

Report of the House of Lords respecting the African Slave Trade, July 23, 1849.

Report of the Select Committee of the House of Commons on the Slave Trade Treaties, August 12, 1853.

"Whereas that *criminal traffic* is still carried on."—*Treaty of Washington*, August 1842, between Great Britain and the United States.

"Dont le trafic honteux a, durant des siècles, fait gémir l'humanité."—*Martens*, s. 150, b.

"In voller und gerechter Auerkennung der Gesinnungen und Grundsätze *christlicher Menschenliebe*, zur gänzlichen Ausrottung dieses verbrecherischen Handels mitzuwirken, solle der *Negerhandel* gleich der *Seeräuberei* bestraft" u.s.w.—*Resolution of the German Confederation*, June 19, 1845.

*De M. et de C.* t. v. p. 30.

abolition of "a scourge which has so long désolated Africa, "degraded Europe, and afflicted humanity" (a).

CCCI. By the first additional article to the Treaty of Paris (1814) France, "unreservedly participating in the sentiment of England, with respect to a species of commerce "opposed to the *principles of natural justice*, and to the enlightened opinions (*lumières*) of our time," engaged to co-operate heartily in putting down the Slave Trade (b). In 1818 a royal ordinance carried this resolution into practical effect. By Treaties in 1831 and 1833, Great Britain and France mutually conceded to each other the *right of search* of suspected vessels within certain localities: by these Treaties the captured vessel was to be brought in and tried before the court of the country to which it belonged. France would not, however, consent that her subjects should be amenable to a mixed Commission Court, such as, in the case of Sweden, the Netherlands, and Portugal, had been established by Treaty with Great Britain. In May 1845 a fresh convention was entered into between France and Great Britain, by which each country engaged to keep twenty-two cruisers: but at a Conference held in London in May 1849 the number was diminished to twelve, with a condition that, if hereafter requisite, the number should again be increased (c).

CCCI. With regard to Spain, it was not till June 1835 that a Treaty was concluded with Great Britain, which really made effectual the engagements of a Treaty in 1817. In 1853, a Select Committee of the House of Commons reported: "The Brazilian Government have rendered any "such measure unnecessary, so far as regards Brazil: but as "regards Cuba, it is a matter of great surprise, that whilst "Spain is at this time indebted to England and France for "their efforts to form a tripartite convention with the United

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(a) *Koch, Hist. des Tr.* t. iii. p. 428, mentions that Denmark, as early as 1794, passed an ordinance for the abolition of slavery in her colonies after a lapse of ten years; that it took effect in 1804, but was not notified to other States.

(b) *De M. et de C.* t. iii. p. 20.

(c) *Hertslet's Treaties*, vol. viii. p. 1061-4.

“ States, in order to protect Cuba from piratical attacks, the  
 “ Government of Spain should not take warning from the  
 “ fact that one of the reasons alleged by the Government of  
 “ the United States for not joining that Convention, is the  
 “ continuance of the Slave Trade in that island.”

Mr. Everett, in his letter, dated Washington, December 1, 1852, to Mr. Crampton, the British Minister at Washington, writes : “ I will but allude to an evil of the  
 “ first magnitude, I mean the African Slave Trade, in the  
 “ suppression of which England and France take a lively  
 “ interest, an evil which still forms a great reproach upon  
 “ the civilization of Christendom, and perpetuates the barbarism of Africa ; but for which, it is to be feared, there  
 “ is no hope of a complete remedy while Cuba remains a  
 “ Spanish colony.”

CCCV. The Treaties of Portugal with Great Britain of 1810, 1815, 1817 (which last conceded the right of reciprocal *search*), of 1825, followed by an official note from Portugal in 1826, acknowledged the obligation and necessity of suppressing the Slave Trade, but were nevertheless ineffectual for this purpose throughout the Portuguese Colonies. In 1839, a British Act of Parliament was passed, authorizing British cruisers to seize Portuguese vessels suspected to be Slavers. This Act has been vehemently attacked as a violation of International Law (*d*); it must of course be considered with reference to the previous Treaties, upon which its authority was founded. But whatever may be the correct decision upon this point, by a Treaty in July 1842, followed by additional articles in October, a mutual right of *search* and courts of mixed commission have been conceded. The last Anglo-Portuguese treaty was signed in May 1879.

Similar conventions exist between the Netherlands and Great Britain, the latest being those of February 1837 and August 1848.

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(*d*) *Wheaton's Hist.* p. 605.

*De M. et de C. t. v. p. 442.*



CCCVI. Great Britain has entered into various negotiations with the United States of North America, having for their object the suppression of the Slave Trade; but they have not been successful in inducing the United States to join in a league with other Powers for this object: the utmost that has been obtained is to be found in the Treaty of Washington, in August 1842, by which each Power is to maintain a naval force on the coast of Africa, and, if *both* Governments so order, to act in concert with each other, and to use their efforts to induce the African States, that allow Slave Markets, to close them.

The question of the *Right of Visit* has been a matter of sore contention between Great Britain and the North American United States: the latter has refused to distinguish it from the *Right of Search*, which, they justly say, is an exclusively *belligerent* Right. The British Government, on the other hand, has denied the identity of the two Rights, and has claimed merely to ascertain the nationality of ships hoisting, under suspicious circumstances, the flag of the United States, alleging that when once that nationality is ascertained to be that of the United States, they immediately release, whatever be her cargo or destination, the vessel; and that it is manifest, that if the mere hoisting a particular ensign (*e*) was to supersede all inquiry, the Slave Trade might be carried on with impunity (*f*).

This subject has since received an adjustment by the Treaty of April 7, 1862, between England and the United States.

The chief provisions of this Treaty are, as Mr. Dana observes: "The right to detain, search, seize, and send in "for adjudication, is confined to cruisers of either Power,

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(*e*) This fact appears to be fully admitted in the Treaty of Washington, 9th article: "Whereas, notwithstanding all efforts which may be made on the coast of Africa for suppressing the Slave Trade, the *facilities for carrying on that traffic and avoiding the vigilance of cruisers by the fraudulent use of flags, is so great,*" &c.

(*f*) *Wheaton's Hist.* ss. 33, 34, pp. 585, 749. The subject is very elaborately discussed.

“ expressly authorized for that purpose ; and is to be exercised only over merchant vessels, and only within a distance of two hundred and twenty miles from the coast of Africa, and to the southward of thirty-two degrees north latitude, and within thirty leagues from the island of Cuba, and never within the territorial waters of either contracting Power. The right to visit is to be exercised when there is ‘ reasonable ground ’ to suspect a vessel of having been fitted out for, or engaged in, the trade. The only trade referred to is ‘ the Slave Trade upon the coast of Africa,’ or the ‘ African Slave Trade.’ To secure responsibility and freedom from vexation, special provisions are made as to exhibiting written authority, with names of the cruiser and her commander; entries on log-books; requiring the boarding officers and commanders of authorized cruisers to be of a certain rank in the navy; providing exchange of notifications between the two Powers of the names of vessels and commanders employed, and as to the course to be pursued in case of convoy, &c.; and stipulations that each Power will make indemnification for losses to vessels arbitrarily and illegally detained. As to what shall constitute reasonable suspicion, certain articles or arrangements found on board are specified as authorizing a bringing in for adjudication, and as affording protection against claims for damages, and as *prima facie* evidence of being in the trade, and as authorizing condemnation of the vessel, unless clear and incontrovertible evidence is adduced that they were engaged in legal business. Mixed tribunals are constituted for adjudication upon the vessels, but persons are to be sent home to their respective jurisdictions to be tried. Vessels condemned by the tribunals are to be broken up, unless either Government takes them for its navy, at an appraisement; and the negroes found on board are to be delivered to the State whose cruiser made the capture, and to be by that State set free ” (g).

CCCVII. On this subject, of Visit, the stipulations in the Treaty of May 1845, between Great Britain and France, two Powers as jealous as any that exist of national honour and national right, may be cited as most fair, reasonable, and worthy of imitation (*h*). The Eighth Article of that Treaty is as follows:—

“Whereas experience has shown that the traffic in Slaves, in those parts of the world where it is habitually carried on, is often accompanied by acts of piracy dangerous to the tranquillity of the seas and to the safety of all flags: and considering at the same time that if the flag carried by a vessel be *prima facie* evidence of the national character of such vessel, this presumption cannot be considered as sufficient to forbid in all cases the proceeding to the verification thereof, since otherwise all flags might be exposed to abuse, by their serving to cover piracy, the Slave Trade, or any other illegal traffic, it is agreed, in order to prevent any difficulty in the execution of the present Convention, that instructions, founded on the Law of Nations and on the constant usage of maritime Powers, shall be addressed to the commanding officers of the British and French squadrons and stations on the coast of Africa. The two Governments have accordingly communicated to each other their respective instructions, which are annexed to this Convention.”

Among other instructions to the cruisers were the following upon the delicate question of visit:—

“You are not to capture, visit, or in any way interfere with vessels of France, and you will give strict instructions to the commanding officers of cruisers under your orders to abstain therefrom. At the same time you will remember that the King of the French is far from claiming that the flag of France should give immunity to those who have no right to bear it, and that Great Britain will not allow vessels of other nations to escape visit and examination by

“merely hoisting a French flag, or the flag of any other nation, with which Great Britain has not by existing Treaty the right of search. Accordingly, when from intelligence which the officer commanding her Majesty’s cruiser may have received, or from the manœuvres of the vessel, or other sufficient cause, he may have reason to believe that the vessel does not belong to the nation indicated by her colours, he is, if the state of the weather will admit of it, to go ahead of the suspected vessel, after communicating his intention by hailing, and to drop a boat on board of her to ascertain her nationality, without causing her detention, in the event of her really proving to be a vessel of the nation the colours of which she has displayed, and therefore one which he is not authorised to search; but should the strength of the wind or other circumstance render such mode of visiting the stranger impracticable, he is to require the suspected vessel to be brought to, in order that her nationality may be ascertained, and he will be justified in enforcing it if necessary, understanding always that he is not to resort to any coercive measure until every other shall have failed; and the officer who boards the stranger is to be instructed merely in the first instance to satisfy himself, by the vessel’s papers or other proof, of her nationality, and if she prove really to be a vessel of the nation designated by her colours, and one which he is not authorised to search, he is to lose no time in quitting her, offering to note on the papers of the vessel the cause of his having suspected her nationality, as well as the number of minutes the vessel was detained (if detained at all) for the object in question; such notation to be signed by the boarding officer, specifying his rank and the name of her Majesty’s cruiser, and whether the commander of the visited vessel consent to such notation on the vessel’s papers or not (and it is not to be done without his consent): all the said particulars are to be immediately inserted in the log-book of her Majesty’s cruiser, and a full and complete statement of the circumstances is to be sent, addressed to the Secretary

“ of the Admiralty, by the first opportunity direct to England,  
 “ and also a similar statement to you as senior officer on the  
 “ station, to be forwarded by you to our secretary, accom-  
 “ panied by any remarks you may have reason to make  
 “ thereon. The commanding officers of her Majesty’s vessels  
 “ must bear in mind that the duty of executing the instruction  
 “ immediately preceding, must be discharged with great care  
 “ and circumspection. For if any injury be occasioned by ex-  
 “ amination without sufficient cause, or by the examination  
 “ being improperly conducted, compensation must be made  
 “ to the party aggrieved; and the officer who may cause an  
 “ examination to be made without sufficient cause, or who may  
 “ conduct it improperly, will incur the displeasure of her  
 “ Majesty’s Government. Of course, in cases when the sus-  
 “ picion of the commander turns out to be well founded, and  
 “ the vessel boarded proves, notwithstanding her colours, not  
 “ to belong to the nation designated by those colours, the  
 “ commander of her Majesty’s cruiser will deal with her as  
 “ he would have been authorized and required to do had she  
 “ not hoisted a false flag.”

At the Congress of Vienna in 1815, of Aix-la-Chapelle in 1818, of Verona in 1822, the abolition of the Slave Trade as a *principle of Public Law* was formally adopted.

Since these periods the principle has been carried into execution by Special Treaties (i) between Great Britain and the different States of Christendom, both in the New and the Old World, and also with various Heathen potentates on the southern coast of Africa. Many countries have stamped the character of piracy upon this horrible traffic, so far as the authority of their own Municipal Laws may extend. When the Brazilian Empire became separated from Portugal, it acknowledged itself bound by the Treaties of the latter kingdom; but the Treaties favourable to the abolition of

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(i) “ Ils [that is, these Congresses] ont, *en principe*, adopté son abolition; depuis des traités particuliers sont venus donner la vie à la lettre morte du principe, et fonder le droit international.”—*De M. et de C. t. v.* p. 437: ‘*Traité des Noirs.*’

the Slave Trade met with much opposition in the new kingdom. In November 1826 the Brazils adopted the Portuguese Treaty with Great Britain of 1817, and in 1835 two articles were added to it; but the trade continued nevertheless. In August 1845 a British Act of Parliament (8 & 9 Victoria, c. 122) was passed, declaring Brazilian slavers justiciable in the British Courts of Admiralty. Against this Act the Brazilian Government formally protested as a violation of International Law (*j*).

But whoever will read the correspondence between Lord Aberdeen, the then English Foreign Minister, with the Brazilian Government in 1845, will be satisfied that the charge is unfounded (*k*). A great and most beneficial change has since that period taken place in the councils and policy of the Brazilian Empire, such as, if persisted in, as there is every reason to suppose will be the case, leaves nothing to desire on the part of the British Government.

In December 1841 Austria, Prussia, and Russia, the only Great Powers who had not before that period entered into Conventions on this subject, concluded a Treaty, which was ratified in February 1842, which placed the Slave Trade in the category of Piracy, and by which they bound themselves to exert every effort for the repression of this abominable offence.

CCCVIII. If Great Britain was deeply dyed by her *assiento* contract and her colonial slavery in this accursed commerce, her worst enemies must admit that she has, since the beginning of this century, been indefatigable in her efforts to wipe away the stain. She has made it "her own cause," to borrow the expression of the great foreign publicists of our day (*l*). Nor can the disinterested character of her righteous exertions be denied, since the Statute of 3 & 4 William IV. c. 73, by

(*j*) *Vide post*, the case of *Regina v. Da Serva*, 1 *Denison Crown Cases Reserved*, p. 104.

(*k*) Report from the Select Committee of the House of Commons on the Slave Trade Treaties, August 12, 1853.

(*l*) *De M. et de C.*, "sa propre cause," t. v. p. 440, and elsewhere.

which she has, at no small risk, and with no common amount of pecuniary sacrifice, abandoned domestic slavery in her colonies.

To be cognizant of the Treaties (*m*) entered into between Great Britain and other States, is to be apprised of all that have been concluded upon this subject; to know their contents is to be acquainted with the international history of the abolition of the Slave Trade.

The Catalogue of them up to 1850 was as follows :—(*n*)

1814. January 14	Treaty of peace with Denmark.
— March 30	„ „ France.
— August 28	„ „ Spain.
1815. January 22	„ „ Portugal.
— February 8	Declaration signed at the Congress of Vienna.
1817. July 28	Treaty with Portugal.
— September 23	„ Spain.
1818. May 4	„ Netherlands.
1822. November 28	Declaration signed at the Congress of Verona.
— December 10	Treaty with Spain (supplementary article to the Treaty of September 23, 1817).
— December 31	Treaty with the Netherlands (additional article to the Treaty of May 4, 1818).
1823. January 25	Treaty with the Netherlands.
1824. November 6	„ Sweden.
1825. February	„ Buenos Ayres or Rio de la Plata.
— April 18	„ Colombia (since divided into three Republics, New Granada, Equator, and Venezuela).
1826. October 2	Treaty with Portugal (engagement of Portugal by an official Note sent to the English ambassador at Lisbon).

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(*m*) “Depuis cette époque, les efforts du Cabinet de Saint-James ont été incessants; ils ont été (en point de droit du moins) couronnés par le succès: si la *traite* n'a pas entièrement disparu, le principe de son abolition, toutefois, a été généralement adopté: il est inscrit désormais dans le code des nations chrétiennes, qui, toutes, ont flétri un trafic reprouvé par l'humanité, la morale et la philanthropie,—trafic exercé trop souvent avec une cruauté inouïe et avec un barbare mépris pour la race humaine,—trafic auquel les progrès de la civilisation devaient fixer un terme, dû à sa suppression devenir, pendant quelque temps, une cause de souffrance pour les colonies dans leur culture et leur prospérité.”—*De M. et de C.* t. v. p. 436.

(*n*) *De M. et de C.* t. v. p. 440.

1826. November 23	Treaty with Brazil.
— December 26	„ Mexico.
1831. November 30	„ France.
1833. March 22	„ France.
1834. July 26	„ Denmark (her accession to the conventions of 1831 and 1833).
— August 4	Treaty with Sardinia (ditto).
— December 8	„ Ditto (additional article to the Treaty of August 8).
1835. June 28	Treaty with Spain.
1837. February 7	„ The Netherlands.
— June 5	„ The Confederation of Peru, Bolivia.
— June 9	Treaty with the Hanseatic Towns (accession to the conventions of 1831 and 1833).
— November 24	Treaty with Tuscany (ditto).
1838. February 14	„ Two Sicilies (ditto).
1839. January 19	„ Chili.
— March 25	„ Venezuela.
— May 24	„ Rio de la Plata.
— July 13	„ Uruguay (ratified January 21, 1842).
— December 17	Treaty with the Imaum of Muscat.
— December 23	„ Hayti (accession to the conventions of 1831 and 1833).
1840. September 25	Treaty with Bolivia.
— December 16	„ Texas.
1841. February 24	„ Mexico.
— August 7	„ Bolivia.
— December 20	„ Austria, Prussia, and Russia (ratified February 19, 1842).
1842. February 19	(See December 20, 1841).
— July 3	Treaty with Portugal.
— August 9	„ The United States.
1845. May 20	„ France.
1846.	„ The King and the Chiefs of Cape Mount (in Africa).
1848. April 24	Treaty with Belgium.
— September 4	„ Equator.
— September 5	„ Muscat.
1849. August 1	„ Arabs in the Persian Gulf.
1850. April 2	„ New Granada.

The whole matter was thus summed up in a Report of a Committee of the House of Commons:—

“The attention of your Committee has been directed, by  
“the instructions of the House, chiefly to the state of the



“ Slave Trade in the *Brazils* and in *Cuba* ; in the Colonial Possessions of *Portugal*, *Mozambique* on the East, and *Loanda* and *Angola* on the West Coast of Africa ; and they have also briefly inquired into the state of the other parts of the West Coast of Africa, along the principal seats of the Slave Trade.

“ The great interest which the people of this country have taken in the abolition of the Slave Trade appears in the very voluminous details laid annually before Parliament since the year 1815 ; and the Reports of both Houses of Parliament in the years 1849–50 have rendered it needless, in the opinion of your Committee, to pursue the inquiry beyond the last three years.

“ By these Reports, it appears that there were, in 1849–50, twenty-four treaties in force, between Great Britain and foreign civilized Powers, for the suppression of the Slave Trade : ten of which give the right of search and mixed courts ; twelve give the right of search and national tribunals ; and two (with the United States and France) grant no right of search, but do contain a mutual obligation to maintain squadrons on the coast of Africa. There were also at that time forty-two treaties for the suppression of the Slave Trade existing between Great Britain and native chiefs on the Coast of Africa.

“ Since May 1850 two treaties have been concluded with civilized Governments, under which captured vessels are to be adjudicated upon by tribunals of their own countries ; and twenty-three more treaties with native chiefs of Africa for the suppression of the Slave Trade.”

CCCVIII. Numerous Conventions exist between African Chiefs and Governors of English Coast Settlements. More specific reference should, however, be made to the African Treaties between England and the Sultan of Muscat, April 14, 1873, and between England and the Sultan of Zanzibar, June 5, 1873 : also between the same parties, July 14, 1875.

On August 4, 1877, an important Convention (o) was

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(o) See *Gazette* of August 17, 1877 ; and, generally, for these Treaties,

entered into between the British and Egyptian Governments for the suppression of the Slave Trade, signed at Alexandria. The Convention consists of seven articles. By its terms the importation of any slaves into Egypt is absolutely prohibited, and any person found engaged in the traffic will be held by the Government of the Khedive as guilty of "stealing with murder," and, if subject to Egyptian jurisdiction, will be tried by court-martial. All persons found engaged in the mutilation of or traffic in children will be pursued as murderers. The ships of either country may visit, search, and, if necessary, detain all vessels hoisting the flag of the other, engaged in the traffic of slaves, or suspected of being engaged in it. Appended to the Convention are various regulations of the Egyptian Government with regard to emancipated slaves, and a decree prohibiting the sale of slaves in Egypt from family to family. This decree is to take effect in seven years from the date of the Convention. In Soudan it will take effect in twelve years. The penalty will be hard labour from five months to five years, according to the decision of the competent tribunal.

There should be mentioned here two very important Conventions between England and the United States of America: the first signed at Washington April 7, 1862; the other signed June 3, 1870, with an Annex of "Instructions for the Ships of the British and United States' Navies employed to prevent the African Slave Trade." In this place should be mentioned also the following Statutes—(1) 36 & 37 Vict. c. 59: "An Act for regulating and extending the jurisdiction in matters connected with the Slave Trade of the Vice-Admiralty Court at Aden, and of

see Papers laid before Parliament in the same or the following year in which the Treaties were made, and the Collection of Treaties by Sir Edward Hertslet.

A Treaty has just been signed (May 1870) between Great Britain and Portugal, concerning, among other things, the joint action to be taken for the suppression of the Slave Trade on the east coast of Africa and in the interior.

“H.M.’s Consuls, under Treaties with the Sovereigns of  
 “Zanzibar, Muscat, and Madagascar, and under future  
 “Treaties,” August 5, 1873; and (2) an Act of the same  
 year (c. 88) “for consolidating various Treaties relating to  
 “the suppression of the Slave Trade, and for other purposes  
 “connected with it;” and (3) 39 & 40 Vict. c. 46: “An Act  
 “for more effectually punishing offences against the Laws  
 “relating to the Slave Trade.”

CCCIX. Nevertheless, the English Law does not yet hold Slave-trading to be *jure gentium* piracy, and in the case which is about to be cited gave a very extraordinary proof of the jealousy with which it regards any invasion of the strictest provisions, both of International and Municipal Law, even when the lives not only of British subjects, but of British officers and seamen, are concerned.

“On February 26, 1845, the *Felicidade* (*p*), a Brazilian schooner fitted up as a slaver, surrendered to the armed boats of H. M. S. *Wasp*. She had no slaves on board. The captain and all his crew, except *Majavel* and three others, were taken out of her and put on board the *Wasp*. On February 27 the three others were taken out and put on board the *Wasp* also. *Cerqueira*, the captain, was sent back to the *Felicidade*, which was then manned with sixteen British seamen, and placed under the command of Lieutenant *Stupart*. The lieutenant was directed to steer in pursuit of a vessel seen from the *Wasp*, which eventually turned out to be the *Echo*, a Brazilian brigantine, having slaves on board, and commanded by *Serva*, one of the prisoners. After a chase of two days and nights, the *Echo* surrendered, and was then taken possession of by Mr. *Palmer*, a midshipman, who went on board her, and sent *Serva* and eleven of the crew of the *Echo* to the *Felicidade*. The next morning Lieutenant *Stupart* took command of the *Echo*, and placed Mr. *Palmer* and nine British seamen on board the *Felicidade* in charge of her and of the prisoners.

“The prisoners shortly after rose on Mr. Palmer and his crew, killed them all, and ran away with the vessel. She was recaptured by a British vessel, and the prisoners brought to this country to take their trial for murder. The Jury found them guilty.”—A case was reserved for the opinion of the Judges as to the legality of the conviction.

The majority of the Judges who were present at the argument (q) were of opinion that the conviction was wrong, on the ground of want of jurisdiction in an *English* Court to try an offence committed on board the *Felicidade*, and that if the lawful possession of that vessel by the *British* Crown, through its officers, would be sufficient to give jurisdiction, there was no evidence brought before the Court at the trial to show that the possession was lawful.

This decision must have been founded on the two propositions, that, *jure gentium*, the Slave Trade was not Piracy, and that, unless it were so, the British Courts had, under the circumstances, no jurisdiction over an offence committed on board the *Felicidade*. It is impossible, however, to be much surprised, after this trial, and the facts revealed during its pendency, at the statute of the British Parliament in August 1845.

CCCX. The illegality of Slavery, however, according to the Municipal Law, has a very important effect upon the international relations of the State in which such law prevails. If the *moveable property* of the subjects of a State find its way within the limits and jurisdiction of a Foreign State, it may be claimed by and must be restored to the *lawful* owners. In parts of the American Continent, though no longer in the United States, slaves are, unhappily, by Municipal Law considered as chattels or moveable property; a slave escapes or arrives in a country where slavery is illegal; he is claimed by his master; must he be restored? Unquestionably not. Upon what ground? Upon the ground that the *status* of Slavery is contrary both to good morals, and to the funda-

(q) *Regina v. Serva*, 1 *Denison Crown Cases Reserved*, vol. i. p. 154

mental policy. This has been the doctrine of English Law from the date of the famous case of *Somerset* the negro, in 1771; and such it was declared to be in the more recent case of *the Creole*. The doctrine is not affected by the judgment of Lord Stowell, whether right or wrong, in the case of the *Slave Grace*; for that was founded on the alleged principle that the freedom incident to all who touch British soil might be obliterated in the case of a slave, although a British subject or chattel, who returned to the place in which Slavery was legal; his or her liberty had been (said that great judge) placed "into a sort of parenthesis" (r).

CCCXI. The English cases on this subject (s) are few, but clear and quite decisive on the point.

The earliest case in which the doctrine appears to have been judicially laid down was that of *Shanley v. Harvey*, before Lord Chancellor Northington, in 1762. In that case a bill was filed against Harvey, a negro, and others for an account of the personal estate of a deceased person; and the question turned upon whether Harvey, to whom had been given a sum of money by the deceased on her death-bed, was a free man: he had been brought to England before this event happened. Lord Northington dismissed the bill with costs, observing, "as soon as a man sets foot on English ground he is free" (t). The case (u) next in date was that of *Knight* the negro, in 1770, tried before the Scotch Court, in which the same principle of law was acted upon. But the leading case is that of *Somerset* the negro, in 1771. In this case a *habeas corpus* was granted against a *Captain Knowles*, to bring up the body of *Somerset*, who was in his possession in irons, and the cause of his detention. It appeared that *Somerset* had been bought in Virginia, brought to England by his master, and,

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(r) 2 *Haggard, Adm. Rep.* p. 131.

(s) See the argument of Mr. Hargrave before Lord Mansfield, 20 *Howell's State Trials*, p. 1; and the judgment in the case of the *Slave Grace*. A pamphlet by the author on the *Case of the Creole*, which is mentioned below, contains a summary of these cases.

(t) *Eden, Chancery Reports*, p. 126.

(u) *Ferguson on Divorce*, App. 396.

on refusing to return, was sent by his master on board Captain Knowles' ship to be carried to Jamaica, and sold as a slave.

"The only question" (Lord Mansfield said) "before us is, whether the cause on the return (to the writ of *habeas corpus*) is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly the return states that the slave departed and refused to serve, whereupon he was kept to be sold abroad—*so high an act of dominion must be recognized by the law of the country where it is used.* The power of a master over his slave has been extremely different in different countries. *The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law*, which preserves its force long after the reasons, occasion, and time itself from whence it was ever created is erased from memory. *It is so odious that nothing can support it but positive law.* Whatever inconveniences therefore may follow from the decision, I cannot say this case is allowed or approved of by the law of England, and therefore the black must be discharged" (x).

In 1824 (y) this doctrine was upheld to its fullest extent by the Court of Queen's Bench. A British merchant, of the name of Forbes, was proprietor of a cotton plantation near the river St. John, in the Spanish province of East Florida, on which he employed one hundred Slaves, whom he had *legally* purchased. In 1815 thirty-eight of these Slaves escaped from their master, and took refuge on board a British man-of-war, commanded by Sir George Cockburn, who, with Sir Alexander Cochrane, was at that time in command of a squadron on the North American station. Spain was in amity with Great Britain, and Mr. Forbes prayed Sir G. Cockburn "to order the said thirty-eight slaves to be forthwith delivered to him, their *lawful* proprietor." The

(x) The Negro case, 20 *Howell's State Trials*, p. 82.

(y) The following remarks on the English and French Law on this subject are taken from the pamphlet on *the Creole*, already referred to.

Spanish Governor of East Florida made also an application to the same effect. But the Admiral replied, that the Slaves having reached the deck of a King's ship, were become free agents, and that he had no power or right to exercise any control over them. The proprietor, Mr. Forbes, afterwards brought an action against Sir Alexander Cochrane and Sir George Cockburn, in the Court of Queen's Bench at Westminster. The action altogether failed. Upon the trial Mr. Justice Holroyd said: "Now it appears, from the facts of the case, that the plaintiff had no right in these persons, except in their character of Slaves, for they were not serving him under any contract; and, according to the principles of the English law, such a right cannot be considered as warranted by *the general law of nature*. I do not mean to say that particular circumstances may not introduce a legal relation to that extent; but assuming that there may be such a relation, it can only have a local existence, where it is tolerated by the particular law of the place, to which law all persons there resident are bound to submit. Now, if the plaintiff cannot maintain this action under the general Law of Nature, independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled. . . . Here the plaintiff, a British subject, was resident in a Spanish colony, and perhaps it may be inferred, from what is stated in the special case, that by the law of that colony Slavery was tolerated. I am of opinion that, according to the principles of the English law, the right of Slaves, even in a country where such rights are recognized by law, must be considered as founded not upon the Law of Nature, but upon the particular law of that country. And, supposing that the law of England would give a remedy for the violation of such a right by one British subject to another (both being resident in, and bound to obey the laws of that country), still the right of these Slaves, being founded upon the law of Spain as applicable to the Floridas, must be co-extensive with the

“territories of that State. I do not mean to say, that if  
 “the plaintiff, having the right to possess these persons as  
 “his Slaves there, had taken them into another place, where,  
 “by law, Slavery also prevailed, his right would not have  
 “continued in such a place, the laws of both countries  
 “allowing a property in slaves. The law of Slavery is,  
 “however, a law *in invitum*; and when a party gets out of  
 “the territory where it prevails, and out of the power of his  
 “master, and gets under the protection of another Power,  
 “without any wrongful act done by the party giving that  
 “protection, the right of the master, which is founded  
 “on the Municipal Law of the particular place only, does  
 “not continue, and there is no right of action against a  
 “party who merely receives the Slave in that country,  
 “without doing any wrongful act.”

And the same learned judge further observed: “In this  
 “case the Slaves belonged to the subject of a foreign State.  
 “The plaintiff, therefore, must recover here upon what is  
 “called the *comitas inter communitates*; but it is a maxim  
 “that cannot prevail in any cases where it violates the law  
 “of our own country, the Law of Nature, or the Law of  
 “God.”

Chief Justice Best expressed himself, during the trial of the same cause, in the following emphatic language:—

“Slavery is a local law, and therefore, if a man wishes to  
 “preserve his Slaves, let him attach them to him by affection,  
 “or make fast the bars of their prison, or rivet well their  
 “chains, for the instant they get beyond the limits where  
 “Slavery is recognized by the local law, they have broken  
 “their chains, they have escaped from their prison, and are  
 “free. These men, when on board an English ship, had all  
 “the rights belonging to Englishmen, and were subject to  
 “all their liabilities. If they had committed any offence,  
 “they must have been tried according to English laws. If  
 “any injury had been done to them they would have had a  
 “remedy by applying to the laws of this country for redress.  
 “I think that Sir G. Cockburn did all that he lawfully



“ could do to assist the plaintiff; he permitted him to endeavour to persuade the Slaves to return, but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others; for if any force had been used by the master or any person in his assistance, can it be doubted that the Slaves might have brought an action of trespass against the persons using that force? Nay, if the Slave, acting upon his newly recovered right of freedom, had determined to vindicate that right, *originally the gift of nature*, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? That is substantially decided by *Somerset’s case*, from which it is clear, that such would have been the consequence had these slaves been in England; and so far as this question is concerned, there is no difference between an English ship and the soil of England; for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land? If there be no difference in this respect, *Somerset’s case* has decided the present: he was held to be entitled to his discharge, and, consequently, all persons attempting to force him back into Slavery would have been trespassers, and if death had ensued in using that force, would have been guilty of murder. It has been said that Sir G. Cockburn might have sent them back. *He certainly was not bound to receive them into his own ship in the first instance; but having done so, he could no more have forced them back into Slavery than he could have committed them to the deep.* There may possibly be a distinction between the situation of these persons and that of Slaves coming from our own islands, for we have unfortunately recognized the existence of Slavery there, although we have never recognized it in our own country. The plaintiff does not found his action upon any violation of the English laws, but he relies upon

“the *comity of nations*. I am of opinion, however, that he cannot maintain any action in this country by the *comity of nations*. Although the English law has recognized Slavery, it has done so within certain limits only; and I deny that in any case an action has been held to be maintainable in the municipal courts of this country, founded upon a right arising out of Slavery.

“When they got out of the territory where they became Slaves to the plaintiff, and out of his power and control, they were, by the *general Law of Nature*, made free, unless they were Slaves by the particular law of the place where the defendant received them. They were not Slaves by the law which prevailed on board the British ship of war. I am therefore of opinion that the defendants are entitled to the judgment of the Court.”

CCCXII. This doctrine, it is right to say, however agreeable to the genius, is not peculiar to the free constitution of Great Britain.

In the year 1738, this generous maxim of French jurisprudence was put to its severest test in the case of *Jean Borcaut*, a “*nègre créole*,” which will be found reported in the thirteenth volume of the “*Causes célèbres*,” the substance of which was as follows:—When France became possessed of colonies in the West Indies, she shared the guilt of Christian Europe in permitting slavery in her colonies. The first edict by which it was authorized was issued in 1615; but, nevertheless, till 1716 the slaves of French colonists became free when they touched the soil of France. A royal “*ordonnance*” of that date, the provisions of which were explained and confirmed by one issued in 1738, permitted, under certain provisions ensuring their good treatment and restricting the time of their Slavery, Slaves from the French colonies to be brought by their masters into France without acquiring their freedom. One of the conditions, however, was, that the master should duly register at the first port the arrival of the Slave, the probable time of his stay, &c. &c., according to certain prescribed formalities; in any case

where these conditions had not been literally and strictly fulfilled, the ancient law of France resumed its operation. There had been some omission of these prescribed formalities of registry in the case of the slave *Jean Borcaut*, who accordingly claimed, and after a trial before "l'Audience d'Amirauté" obtained, his liberty. In the report of the trial will be found the *plaidoyers* for the negro, for the Crown, and for the master; and in the speech of the advocate for the master there is this remarkable passage:—

"On ne connoît point, il est vrai, d'esclave en France, et quiconque a mis le pied dans ce Royaume est gratifié de la liberté.

"Mais quelle est l'application, et quelle est la distinction du principe?

"Le principe est vrai dans le cas où tout autre esclave qu'un esclave nègre arrivera dans ce Royaume.

"Par exemple, qu'un étranger, qu'un négociant françois arrive dans ce Royaume avec des sauvages qu'il prétendra être ses esclaves; qu'un Espagnol, qu'un Anglois vienne en ce Royaume avec des esclaves nègres dépendans des colonies de sa nation; voilà le cas dans lequel par la loi, par le privilège de la franchise de ce Royaume, la chaîne de l'esclavage se brisera, et la liberté sera acquise à de pareils esclaves.

"Voilà le cas dans lequel il faut appliquer l'art. 6 du Tit. 1, liv. i. des Instituts de Loysel. Voilà les cas où il faut dire avec M. de René Chopin, que l'entrée dans la ville de Paris assure le maintien, et devient l'asile de la liberté.

"*Lutetiam velut sacro-sanctam civitatem omnibus præbere libertatis atrium quoddam asiliumque immunitatis* (z).

Another instance may be added of the jealousy with which France regarded this partial abrogation of her general law in favour of liberty.

In 1758, "*Francisque*," a negro slave bought by his master in Hindostan, was brought by him to France. *Francisque* claimed his liberty: his master contended that he had

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(z) *Causes célèbres*, tom. xiii. p. 562.

carefully fulfilled the formalities prescribed by the "Code noir;" it was answered that this law only affected African and American Slaves, and could not be extended to the East Indies. The Slave obtained his liberty (a). The force of these examples is not weakened by the reflection that they are furnished by what was at the time an undeniably despotic State. Such was the law in favour of liberty, passed even by an absolute monarchy during what would now be designated the comparatively dark ages.

CCCXIII. The same doctrine was maintained by Poland during the period of her existence as an independent kingdom.

Wicquefort (b), in that part of his treatise on the functions of ambassadors in which he discusses the privileges of their residence, tells the story of a certain Pole who, having left his country and gone into Muscovy, had there sold himself into Slavery, but afterwards, being in Holland, he fled to the house of the Polish Ambassador: "Les Moscovites  
 " en firent tant de bruit, que les estats de Hollande, après  
 " avoir fait occuper toutes les avenues de la maison, y firent  
 " entrer quelques officiers et soldats pour faire la recherche  
 " du fugitif. Ils n'y trouvèrent personne, et cependant ils  
 " firent cet affront au ministre public du roy de Pologne. Le  
 " Polonois n'estoit point esclave né du Czaar; et s'il l'estoit  
 " devenu en allant demeurer en Moscovie, *il recourra sa liberté*  
 " *naturelle en mettant le pié dans un pais qui ne nourrit point*  
 " *d'esclaves, et où on ne derroit point sçavoir ce que c'est que*  
 " *de servitude ou d'esclavage. Les Jurisconsultes françois*  
 " *disent, que l'air de France est si bon et si bénin, que dès*  
 " *qu'un esclave entre dans le Roiaume, mesme à la suite d'un*  
 " *ambassadeur, il ne respire que liberté, et la recouvre aussi-*  
 " *tost.*"

CCCXIV. The last occasion upon which an international question of this kind was raised happened in 1841.

(a) *Denisart, Décisions nouvelles*, tom. iii. p. 406, tit. 'Nègre,' n. 45.

(b) *L'Ambassadeur et ses Fonctions*, par M. de Wicquefort, t. i. p. 418.

A brig belonging to a subject of the United States, called *the Creole*, of Richmond in Virginia, sailed on October 27, 1841, with a cargo of merchandise, and one hundred and thirty-five slaves, from the Hampton Roads, for New Orleans. During the passage, the slaves mentioned killed a slave-owner, who resisted their attempt to free themselves, wounded the captain, and compelled the rest of the crew to take the vessel into the port of Nassau in New Providence Island, in possession of the British Crown. On their arrival, the American Consul requested that a guard might be placed to prevent the escape of persons charged with a piratical act: the request was acceded to. An investigation was made into the circumstances by two British magistrates, the result of which was, that nineteen persons were imprisoned as being connected with the murder, the remainder being allowed to stay or depart as they pleased. The British authorities further refused to deliver up the nineteen until they should have received instructions to that effect from England.

The claim of the Government of the N. A. United States, that the *coloured persons*, as the slaves were called, should be restored to their master, was not acceded to on the part of the British Government (c). It would only have been necessary to cite, in answer to such demands, the language of Mr. Justice Story: "*So the state of Slavery will not be recognized in any country whose institutions and policy prohibit Slavery*" (d).

Bodinus, in his first book, "*De Republica*" (e), testifies that such had been from early times the law and custom of France. He illustrates it by two examples. The first was the case of a Spanish Ambassador who brought with him a Slave in his retinue. The Slave, in

(c) See pamphlet on the case of *The Creole*, already referred to, and opinion of the Law Lords in the House of Lords, February 1842.

(d) *Story's Conflict of Laws*, p. 97. See also *Mr. Wheaton's Treatise on International Law*, vol. i. p. 146, exception 2.

(e) *L. i. de Rep.* p. 41. *Bod. de Rep.* libri sex. Paris, 1586.

spite of all remonstrance, claimed and obtained his freedom on entering the French dominions. In the second instance, a Spanish merchant happened to touch at Toulon on his way to Genoa, with a domestic Slave among his servants, when "hospes, re intellecta, servo persuasit ut ad libertatem provocaret;" the merchant complained that he had *bona fide* purchased the slave, that he was not bound by the law of France, that he was not resident there, but happened only to touch at a French port on his passage to Genoa, and that at least he ought to be remunerated for the purchase-money of the slave; but he found that his remonstrance was fruitless, and made a private bargain with his slave for the continuance of his services.

CCCXV. The Constitution of the United States recognized the relation of Master and Slave where it existed by the local law of a particular State, but the Convention inserted, at the instance of the Southern States, the following clause:—

"No person held to service or labour in one State, under the law thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due."

Subsequent Acts were passed to give effect to this clause, and the Supreme Court held that laws made by the States to prevent the arrest and recovery of fugitive slaves were unconstitutional and void (*f*).

But the law was regarded with increasing disgust by the inhabitants of the free-labour States, and in 1858 Mr., afterwards President, Lincoln said :

"I believe this Government cannot permanently endure half slave and half free. I do not expect the Union to be dissolved; I do not expect the house to fall; but I do expect that it will cease to be divided. It will become

(*f*) *Prigg v. Commonwealth of Pennsylvania*, 16 *Peters Rep.* pp. 530-532.

“all one thing, or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction, or its advocates will push it forward till it shall become alike lawful in all the States, old as well as new, North as well as South” (g).

In 1865 the *status* of Slavery was formally abolished in the United States.

Brazil and Cuba are now the only Christian States in which Slavery exists as a legal institution. In Brazil a law has been passed enacting that every child born of slave parents after September 28, 1871, shall be free; and declaring free from that date all slaves belonging to the State or Imperial household. The same law provides an emancipation fund, to be annually applied to the ransom of a certain number of slaves owned by private individuals, and their number is rapidly diminishing. The importation of slaves has been forbidden since 1853.

Cuba has been of late years in a perpetual state of insurrection, but the Spanish Government have pledged themselves to abolish slavery in the island as soon as peace is restored (h).

CCCXVI. I may now, therefore, with increased confidence repeat the opinion expressed in the former edition of this work, that, on the whole, it seems not unreasonable to hope, that before many more years have elapsed, both Municipal and International Law will be brought into harmony with the Law of Nature; and that, to the question of the abolition both of Slavery and the Slave Trade, the emphatic language of Grotius may be applicable—“*humano generi placuit*” (i).

(g) *The Neutrality of Great Britain during the American Civil War*, by M. Bernard, Professor of International Law at Oxford, pp. 24-27.

(h) *Encyclop. Brit.* 1877, iii. 234. *Report of Fugitive Slave Commission*, 1876.

For the Brazilian Law of 1871, see *Hertslet's Treaties*, xiii. p. 174. As to Cuba and Porto Rico, *ibid.* p. 793.

(i) L. ii. c. x. 2, 1.

CCCXVIA. On December 5, 1875, the Lords of the Admiralty issued certain instructions in lieu of "certain previous instructions (j) for the guidance of the commanders of her Majesty's ships in reference to the receipt of Fugitive Slaves."

The publication of these instructions caused a great sensation throughout the country. They were construed as generally curtailing and, in some respects, abolishing the protection of the British flag hitherto accorded to Fugitive Slaves. The Government, in consequence of the feeling excited against the instructions, issued a Commission, dated February 14, 1876, to certain persons, including the author, "to inquire into and report upon the nature and extent of such international obligations as are applicable to questions as to the reception of Fugitive Slaves by your Majesty's ships in the territorial waters of Foreign States, and into all instructions from time to time issued to the Commanders of your Majesty's ships relative thereto, and whether any engagements into which this country has entered bear upon such questions; and whether, in case such obligations, instructions, or engagements shall appear to be at variance with the maintenance by your Majesty's ships and officers, in whatever waters they may be, of the right of personal liberty, any and what steps should be taken to secure for them greater freedom of action in this respect."

The Commissioners inquired into the law and practice of foreign countries as well as of England upon this subject. They made an elaborate Report, dated May 30, 1876, at the close of which they expressed themselves as follows:—

"We have now stated what we believe will be the best course to promote the humane and enlightened policy which this country has consistently pursued, but it will be convenient to recapitulate the purport of our recommendations.

"I. While on the one hand naval officers should abstain

(j) See *Report of the Commissioners on Fugitive Slaves*, presented to Parliament 1876, p. 18.



“ from any active interference with slavery in countries where  
“ it is a legal institution, the commander of a ship of war  
“ should not be altogether prohibited from exercising his discretion as to retaining a fugitive slave on board his vessel,  
“ whether such slave has come on board clandestinely or  
“ in any other way.

“ II. The cases that present themselves to naval officers  
“ vary so much in character that it would be inexpedient,  
“ even were it possible, to lay down any strict rules for their  
“ guidance under all the different circumstances which may  
“ occur.

“ III. Ships of the Royal navy should not be made a general  
“ asylum for fugitive slaves; and the commander should,  
“ therefore, before retaining a slave on board, satisfy himself  
“ that there is some sufficient reason for so doing. *Such*  
“ *reason (where there is no Treaty authorizing the release of*  
“ *the slave), consisting not only in the desire of the slave to*  
“ *escape from slavery, but in some circumstance beyond this*  
“ *desire (k).*

“ IV. In dealing with this question the officer should be  
“ guided, before all things, by considerations of humanity.  
“ Whenever, in his judgment, humanity requires that the  
“ slave should be retained on board,—as in cases where the  
“ slave has been, or is in danger of being, cruelly used,—the  
“ officer should retain him. In other cases he should do so  
“ only where special reasons exist.

“ V. When it appears that the fugitive has been newly  
“ reduced to slavery, or imported in violation of treaty engagements, or entitled to his freedom under the special provisions of a treaty—as under the Treaty with Zanzibar of 1875,—he should always be retained.

“ VI. If the delivery of a fugitive slave, whom the officer  
“ would otherwise have thought it right to retain, be claimed  
“ on the ground that he has committed a criminal offence, that  
“ is, an offence for which he would equally have been punish-

(k) *Vide post*, p. 440, note *m*, as to dissent of the author.

“able according to the local law if he had been a free man,  
“the officer ought, before complying with the request, to  
“satisfy himself that the charge is not merely a colourable  
“pretext for procuring the restitution of the slave, and also  
“that the slave, if delivered up, will not be treated with in-  
“humanity.

“VII. Where a slave has come on board under such cir-  
“cumstances as to give his master a right to expect that he  
“will not be harboured there against the master's will, as in  
“the case of slaves attending their masters on visits of cere-  
“mony, or entering a ship in order to coal her, or with pro-  
“visions for sale, the slave should not be retained unless his  
“retention should appear to be demanded by strong reasons  
“of humanity.

“VIII. In all cases where the officer decides that the  
“fugitive should not be retained, he should consider what  
“course would be most for the interest of the slave himself:  
“whether to put the slave on shore, or allow him to go  
“ashore, or deliver him over to the nearest British Diplo-  
“matic or Consular officer, or to the local authorities. But  
“the officer should not compel the slave to leave the ship  
“unless satisfied that such a measure would not lead to any  
“ill-treatment of him on account of his attempt to escape.

“IX. Where facilities are available for communicating  
“with any of your Majesty's Diplomatic or Consular autho-  
“rities, the officer should in all cases without delay inform  
“such authority of the steps he has taken.

“We hope that the instructions which we have recom-  
“mended to be given to our naval officers will, if carried  
“into effect, tend to some mitigation of the cruelties of  
“slavery which have been brought to our notice.

“It is obvious that the benefits to be derived from these  
“recommendations will depend to some extent upon the  
“degree to which a similar policy may be adopted by other  
“nations. It is not within the scope of our duty to suggest  
“the manner in which this result should be brought about,  
“but we regard it as a matter of the first importance.

“ It must be observed that the reception of fugitive slaves  
 “ is only a small part of the great problem of slavery which  
 “ this country earnestly desires to solve, and must be treated  
 “ as subordinate to that greater purpose. For this end the  
 “ British Government must, if the evidence which we have  
 “ taken is to be trusted, enter into some arrangements with  
 “ those powers whose possessions are in the immediate neigh-  
 “ bourhood of the slave-trading districts. If the Red Sea is  
 “ to serve the purpose of the slave-dealer, and the hoisting of  
 “ the Turkish or Egyptian flag is to protect this traffic, our  
 “ efforts to abolish the slave trade must be ineffectual. So  
 “ again in Portuguese waters (*l*), we should seek to obtain the  
 “ right of search which under former treaties we possessed.  
 “ It would also be desirable to obtain some modification of  
 “ the treaty with Madagascar.

“ Some of these matters are perhaps beyond the strict  
 “ limits of the inquiry for which this Commission was ap-  
 “ pointed, but the release of a few fugitive slaves would have  
 “ little effect on slavery or the slave trade, unless measures  
 “ were also taken to block the larger channels through which  
 “ the slave-dealer can still conduct a lucrative trade in  
 “ African captives.

“ In concluding this Report we must express the great  
 “ obligations under which we are to Foreign Governments,  
 “ and to your Majesty’s officers, both at home and abroad,  
 “ for the valuable assistance and information they have  
 “ afforded us in our inquiry.

“ SOMERSET.

“ H. T. HOLLAND.

“ A. E. COCKBURN.

“ L. G. HEATH.

“ ROBERT PHILLIMORE (*m*).

“ H. S. MAINE.

“ MOUNTAGUE BERNARD.

“ J. F. STEPHEN.

“ T. D. ARCHIBALD.

“ H. C. ROTHERY.”

“ ALFRED HY. THESIGER.

(*l*) A Treaty between this country and Portugal, making further provision for the suppression of the Slave Trade in East Africa, was signed at Lisbon in May 1879. *Vide supra*, p. 423, note.

(*m*) “I agree with the Report except on one point. I do not approve of

Subsequently to this Report the Lords of the Admiralty issued the following Circular:—

“ADMIRALTY, August 16, 1870.

“*Receipt of Fugitive Slaves.*

“My Lords Commissioners of the Admiralty are pleased  
“to direct that the following instructions shall be con-  
“sidered as superseding all previous instructions issued  
“for the guidance of commanding officers of her Majesty’s  
“ships, as to the receipt of Fugitive Slaves.

“These instructions are to be considered part of the  
“‘General Slave Trade Instructions,’ and to be inserted at  
“page 29 of that volume, in lieu of the Circular dated  
“December 5, 1875, with the heading of ‘Receipt of Fugi-  
“tive Slaves,’ but they are also intended for the guidance  
“of commanding officers of her Majesty’s ships generally.

“1. In any case in which you have received a fugitive  
“slave into your ship and taken him under the protection  
“of the British flag, whether within or beyond the terri-  
“torial waters of any State, you will not admit or entertain  
“any demand made upon you for his surrender on the  
“ground of Slavery.

“2. It is not intended, nor is it possible, to lay down  
“any precise or general rule as to the cases in which you  
“ought to receive a fugitive slave on board your ship.  
“You are, as to this, to be guided by considerations of  
“humanity, and these considerations must have full effect  
“given to them whether your ship is on the high seas or  
“within the territorial waters of a State in which Slavery  
“exists; but in the latter case you ought, at the same time,  
“to avoid conduct which may appear to be in breach of in-  
“ternational comity and good faith.

“3. If any person, within territorial waters, claims  
“your protection on the ground that he is kept in slavery

the last sentence of Section III. (p. 438) of the Recommendations.”—  
ROBERT PHILLIMORE. Sir George Campbell dissented from the Report,  
and wrote a separate paper.

“contrary to Treaties with Great Britain, you should receive him until the truth of his statement is examined into. This examination should be made, if possible, after communication with the nearest British Consular authority, and you should be guided in your subsequent proceedings by the result.

“4. A special report is to be made of every case of a fugitive slave received on board your ship.

“By command of their Lordships,

“VERNON LUSHINGTON.”

“To all Commanders-in-Chief, Captains, Commanders, and Commanding Officers of Her Majesty’s Ships and Vessels.”

## CHAPTER XVIII.

## RIGHT OF JURISDICTION OVER PERSONS.

CCCXVII. WE have now to consider the right incident to a State of absolute and uncontrolled power of jurisdiction over all Persons, and over all Things, *within* her territorial limits, and, as will be seen in certain specific cases, *without* them.

CCCXVIII. First, as to the Right of Territorial Jurisdiction over Persons: they are either

1. Subjects, or
2. Foreigners commorant in the land.

CCCXIX. 1. With regard to the jurisdiction and authority of States over their own proper subjects, no doubt can be raised; under the term *subject* may be included both *native* and *naturalized* citizens. With respect to *native* citizens, the right of which we are speaking is manifestly essential to the independence of the State. “*Sanè*” (Grotius observes) “*ex quo civiles societates institutæ sunt, certum est rectoribus cujusque speciale quoddam in suos jus quæsitum*” (*a*).

The native citizens of a State are those born within its dominions (*b*), even including, according to the law of England (*c*), the children of alien friends. So are all those born on board the ships of the *navy*, or within the lines of the *army*, or in the house of the Ambassador, or of the Sove-

(*a*) L. ii. c. xxv. 8.

(*b*) *Günther*, vol. ii. p. 261.

(*c*) 2 *Stephen's (Blackstone's) Commentaries* (ed. 1858), p. 413. *Calvin's case*, 7 *Coke Rep.* p. 18 a.

reign (*d*) if he should happen to be sojourning in a foreign country.

Every State has an undoubted claim upon the services of all its citizens. Every State has, strictly speaking, a right of prohibiting their egress from their own country (*e*), a right still exercised by some of the continental Powers of Europe. These rights are subject to no control or directions as to their exercise from any foreign State.

CCCXX. Every State has a right of recalling (*jus avocandi*) its citizens from foreign countries (*f*), especially for the purpose of performing military services to their own country, unless they have been with its permission naturalised abroad. Great difficulty, however, necessarily arises in the enforcement of this right. No foreign nation is bound to publish, much less enforce, such a decree of revocation. No foreign State can legally be invaded for the purpose of forcibly taking away subjects commorant there. The high seas, however, are not subject to the jurisdiction of any State; and a question therefore arises whether the State seeking its recalled subjects can search for them in the vessels of other nations met with on the high seas? This question, answered in the affirmative by Great Britain, and in the negative by the United States of North America, has led to very serious quarrels between the two nations (*g*)—quarrels which it may be safely predicted will not arise again; for I cannot think that it would be now contended

(*d*) *Vide post*.

(*e*) "Solet hic illud quæri, an civibus de civitate abscedere liceat, venia non impetrata. Scimus populos esse ubi id non liceat, ut apud Moschos: nec negamus talibus pactis iniri posse societatem civilem, et mores vim pacti accipere."—*Grot.* l. ii. c. v. 24.

*Wheaton, Elém.* tom. i. p. 135.

(*f*) *Günther*, vol. ii. p. 309.

*Heffter*, s. 59.

(*g*) See correspondence between Mr. Webster and Lord Ashburton, *Wheaton's Hist.* p. 737, &c.

*Vide post*, as to jurisdiction over ships of war and merchant vessels in foreign harbours.

that the claim of Great Britain was founded upon International Law. In my opinion it was not.

CCCXXI. 2. It has been said that these rules of law (*h*) are applicable to *naturalized* as well as *native* citizens. But there is a class which cannot be, strictly speaking, included under either of these denominations, namely, the class of those who have ceased to reside in their native country, and have taken up a permanent abode (*domicilium sine animo revertendi*) in another (*i*). These are domiciled inhabitants; but they have not put on a new citizenship through some formal mode enjoined by the law of the new country. They are *de facto* though not *de jure* citizens of the country of their domicile (*j*).

CCCXXII. It was a great maxim of the constitutional policy of ancient Rome not to allow her citizenship to be shared with that of any other State (*k*). A different custom prevailed in Greece and in other States; but the Roman citizen who accepted another citizenship became *ipso facto* disfranchised of his former rights.

CCCXXIII. It is sometimes said that a different rule prevails in modern times, and that a man can be at one and the same time the citizen of two States (*l*). In truth, however, this must depend upon the civil policy and domestic regulations of each State. But it is true, as a general proposition, that a man can have only *one allegiance* (*m*). The State

(*h*) *Story, Conflict of Laws*, s. 48, c. iii.; *ib.* s. 540, c. xiv.

*Felix*, l. i. t. i. s. 2, *Du Changement de Nationalité*.

*Heffter*, s. 58.

*Colquhoun's Civil Law*, s. 393, vol. i. p. 377; *ib.* s. 389, p. 373.

*Günther*, vol. ii. p. 267.

(*i*) *Vide post*, vol. iv. ch. iv.

*Vattel*, l. i. c. xix. s. 211, &c.

(*j*) *Vide post*, vol. iv. ch. iv., for further remarks on Domicil.

(*k*) *Vide Cicer. Orat. pro Balbo*, *passim*, especially s. 12. See *Zouche's* remarks thereupon, p. 2, s. ii. xiii. *De Jure Fœdali*.

(*l*) *Heffter* (s. 59) maintains this ground in opposition to *Zouche*, cited above.

*Günther*, vol. ii. p. 325, *Einheimischen*.

(*m*) The law is laid down with great perspicuity by *Zouche*. Speaking of a decision of the French tribunals on a question of Domicil, and



may, as Russia has done, forbid her subjects to be domiciled elsewhere, or may permit it as England has done; but in either case, if a collision between the two *allegiances*, so to speak, should arise, the latter would be obliged to yield to the former. For instance, if the two countries were at war, the citizen who was taken in arms on behalf of the country of his naturalization against the country of his birth would, unless such naturalization were authorized by the country of his birth, strictly speaking, be guilty of treason. In these times, probably, most States would take into consideration the length of time during which the new domicile had been acquired, whether offences against the original State were to be punished, or her protection invoked by her long-absent citizen.

CCCXXIV. All strangers *commorant* in a land owe obedience, as subjects for the time being (*subditi temporanei*), to the laws of it. The limitation sometimes incident to this proposition will be stated in a subsequent section, in which the right of protecting subjects in a foreign land is discussed.

CCCXXV. *Naturalized* foreigners are in a very different position from merely *commorant* strangers (*n*). It has been the policy of wise States, it was especially the policy of Rome, to open wide the door for the reception and naturalization of foreigners (*o*).

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vindicating it from the charge of private partiality, he says: "Fortassis vero id respexerunt, quod quamvis incolatus et *Domicilium* in externo regno sufficiunt ad constituendum aliquem *subditum jurisdictioni et prestandis muneribus*, obnoxium non tamen sit satis ad constituendum *Civem*, ut eorum *privilegiorum civilium* sit particeps quæ in *regno natis* competunt, nisi specialis affectio supervenerit."—*De Judicio inter Gentes*, pars ii. s. ii. 14.

(*n*) *Günther*, vol. ii. pp. 267, 316, n. c.

(*o*) "Illud vero sine ulla dubitatione maxime nostrum fundavit imperium, et populi Romani nomen auxit, quod princeps ille, creator hujus urbis, Romulus foedere Sabino docuit, etiam hostibus recipiendis augeri hanc rempublicam oportere: cujus auctoritate et exemplo nunquam est intermissa a majoribus nostris largitio et communicatio civitatis."—*Cic. pro L. Corn. Balbo*. "Male qui peregrinos urbibus uti prohibent, eosque exterminant, ut Pennus apud patres nostros, Papius nuper."—*De Off.* l. iii. c. xi.

*Naturalization* is usually called a change of nationality. The naturalized person is supposed, for the purposes of protection and allegiance at least, to be incorporated with the naturalizing country.

This proposition is, generally speaking, sound; but it must admit of one qualification similar to that already mentioned with respect to the domiciled subject, if the naturalised person should have been the original subject of a country which did not allow him to shake off his allegiance (*exuere patriam*). In this event, if he should find himself placed in a situation—the breaking out of war, for instance—in which his duties to the country of his birth and of his adoption are at variance, the former country would not regard him as a lawful enemy, but as a rebel; nor could the *jus avocandi* already spoken of be legally denied to her by the adopting or naturalizing country, though the enforcement of the right could not be claimed. Banishment itself does not destroy the original tie of allegiance.

The Letter of Sir L. Jenkins, from Nimeguen, to Sir William Temple, at the Hague, contains the opinion of a most careful, learned, and practical jurist upon this question:

“My Lord,

“To the question you were pleased to send me, about the three  
“*Scotchmen*, and the objection of the States to your memorial, that after  
“a sentence of banishment, the allegiance of a subject is extinguished;  
“I have this with submission to offer, that there are several things in  
“the Practice of Nations (which is the law in the question) that make  
“it impossible for subjects, in my poor opinion, to renounce or divest  
“themselves of the allegiance they were born under.

“For instance, no subject of our master's (we'll put the case at home)  
“can by the Law go out of his dominions without his leave; nor is  
“this leave, whether it be expressed or by implication (as in the case  
“of merchants and sea-faring men), granted, but there is a time always  
“supposed for his return; I mean when the King had need of his  
“service; and in the case of every man of quality it is always prefixed.  
“Besides there is no doubt, and we see it is a frequent practice in *Eng-*  
“*land, France, &c.*, to call back the subjects from foreign services and  
“residences within a time prefixed, and that upon pain of death; in  
“which case, if they return not, the pain is well executed upon them  
“(provided they lie not under any impediment), if they afterwards fall  
“into the hands of their master: and I think the Court of Constable

"and Marshal in *England* would be the proper judicature in such a case.

"2. Though my Prince should give his leave to settle myself, for instance, in *Sweden*, and that I should purchase and have land given me in *Sweden*, upon condition, and by the tenure of following the king in his wars; if my king should afterwards have a war with *Sweden*, that king cannot command me to follow him against my natural and original master. The reason of it is, he cannot command me to expose myself more than his own natural-born subjects do; which yet would be my case, if I should appear with him in the field against my Natural Liege Lord; into whose hands if I should happen to fall alive, he would have a right to punish me as a traitor and a rebel, and put me to the torture and ignominy of his laws at home, which he cannot pretend to do when he takes those that are not his born subjects, nor inflict anything upon them but what is agreeable to the permissions of war.

"3. Nay, which is more, in the case of Reprisals, if I live in *Sweden*, a Burgher, Officer, or what you please, and a *Dane*, for instance, hath Letters of Reprisals against the *English* nation, if my goods fall into the *Dane's* hands, they are lawful prize, though I be never so much habituated in *Sweden*; unless it proves, that I am so transplanted thither *cum pannis*, that I have neither goods nor expect them in *England*, and have resolved never to return thither; which is an exception that some learned men allow of, but not all: these things show that the quality of a natural born subject is tied with such indissoluble bonds upon every man, that he cannot untie all by any means.

"I am, &c.

"L. JENKINS" (p).

CCCXXVI. A change of nationality is effected by the operation of the law upon the acts of the individual. The wife by her marriage acquires the nationality of her husband; the naturalization of the husband carries with it, *ipso facto*, that of the wife. "C'est la conséquence du lien intime qui unit les époux, consacré par toutes les législations, et passé ainsi en principe du droit international" (q).

Upon the same principle, the naturalization of the father carries with it that of his minor children; and *M. Felix* is

(p) *Life of Jenkins*, vol. ii. p. 713.

*Felix*, l. i. t. i. s. 2. My obligations to this work are very great, though in the present instance there is a departure from the division of the subject adopted by its erudite author; of whose untimely death, during the progress of the first edition of this work, I heard with sincere regret.

(q) *Felix*, ib. s. 40.

of opinion that the naturalization of a widow has the same effect upon her minor children (*r*). It is clear that in neither case are children, *majors* by the law of the land of their birth, affected by the act of their parents.

CCCXXVII. A collective naturalization of all the inhabitants is effected when a country or province becomes incorporated in another country by conquest, cession, or free gift (*s*). Under the old law of France, the Dutch and Swiss and other nations had, by virtue of Treaties, the rights of natives (*indigenatus*); and by the Bourbon Family Compact of 1761, a similar privilege was conceded to Spanish subjects.

CCCXXVIII. The laws of *France* since 1790 have contained a variety of provisions upon the means of *acquiring* and *losing* naturalization (*t*).

By the law now in force, a Frenchman loses his native character by naturalization, or by accepting office without the permission of the State, in a foreign country, or by so establishing himself abroad as to evidence an intention of never returning to his country. He may, however, at any time recover his native character by renouncing his foreign office and domicil, and making due application to the State (*u*).

In the *Austrian* dominions the stranger acquires rights of citizenship by being employed as a public functionary. The

(*r*) *Felix*, l. i. t. i. s. 41.

(*s*) *Günther*, vol. ii. p. 268, n. c.

(*t*) *Felix*, l. i. t. i. s. 2.

(*u*) *Code civil*, l. i. t. i. c. ii. ('De la Privation des Droits civils') s. 17: "La qualité de Français se perdra :—1. Par la naturalisation acquise en pays étranger. 2. Par l'acceptation, non autorisée par le Président de la République, de fonctions publiques conférées par un gouvernement étranger. 3. Enfin, par tout établissement fait en pays étranger, sans esprit de retour.

"Les établissements de commerce ne pourront jamais être considérés comme ayant été faits sans esprit de retour.

"18. Le Français qui aura perdu sa qualité de Français pourra toujours la recouvrer en rentrant en France avec l'autorisation du Président de la République et en déclarant qu'il veut s'y fixer, et qu'il renonce à toute distinction contraire à la loi française."

superior administrative authorities have the power of conferring these rights upon an individual who has been previously authorized, after ten years' residence within the empire, to exercise a profession. Mere admission into the military service does not bring with it naturalization. Emigration is not permitted without the consent of the proper authorities; but the emigrant who has obtained permission, and who quits the empire *sine animo revertendi*, forfeits the privileges of an Austrian citizen. The wife of an Austrian citizen acquires citizenship by her marriage.

In *Prussia* the stranger acquires the right of citizenship by his nomination to a public office; and by a law passed in 1842 the superior administrative authorities are empowered to naturalize any stranger who satisfies them as to his good conduct and his means of existence. Certain exceptions are made with regard to Jews, to subjects of another State belonging to the Germanic Confederation, to minors, and to persons incapable of disposing of themselves. The same rule as in Austria applies to the emigrant. The wife of a Prussian citizen acquires citizenship by her marriage (*x*).

In *Bavaria*, by the law of 1818, the *jura indigenatus* are acquired in three ways:—

1. By the marriage of a foreign woman with a native.
2. By a domicile taken up by a stranger in the kingdom, who at the same time gives proof of his freedom from personal subjection to any foreign State.
3. By royal decree.

The Bavarian citizenship is also lost in three ways:—

1. By the acquisition, without the special permission of the king, of *jura indigenatus* in another kingdom.
2. By emigration.
3. By the marriage of a Bavarian woman with a stranger.

In the kingdom of *Württemberg*, a stranger must belong to a *commune* in order to acquire citizenship, unless he be nominated to a public function. The citizenship is lost by

emigration authorized by the Government, or by the acceptance of a public office in another State.

CCCXXIX. In the kingdom of the *Netherlands* the power of conferring naturalization rests with the Crown by the 9th and 10th articles of the Fundamental Law of 1815.

CCCXXX. In *Russia*, naturalization is effected by taking an oath of allegiance to the Emperor; but naturalised strangers may, at any time, renounce their naturalization and return to their country.

In the *United States of North America*, the Constitution confers on Congress the power to establish a uniform rule of naturalization (y); and it has been held by the tribunals of the highest authority in that country, that the power so vested in Congress is exclusive, and that it cannot be exercised by any one of the Federal States.

In 1868 the United States passed an Act of Naturalization, in which, among other things, it was enacted, "That  
"all naturalized citizens of the United States, while in  
"foreign States, shall be entitled to and shall receive protection of persons and property that is accorded to native-born citizens in like situations and circumstances.

"And whenever it shall be duly made known to the President that any citizen of the United States has been  
"arrested, and is detained by any foreign Government in  
"contravention of the intent and purposes of this Act, upon  
"the allegation that naturalization in the United States  
"does not operate to dissolve his allegiance to his native  
"Sovereign, or if any citizen shall have been arrested and  
"detained, whose release upon demand shall have been unreasonably delayed or refused, the President shall be and

(y) *Vide supra*, ch. v. § cxix.

1 *Kent*, p. 422, pt. ii. l. xix. (5.) 2 *Ib.* p. 50, uniform rule of naturalisation established by Act of 1802.

2 *Dallas, Rep.* 370.

3 *Washington Circuit Rep.* 313.

2 *Wheaton's Rep.* 269.

5 *Wheaton's Rep.* 49.

2 *Kent*, 68.

“ hereby is empowered to suspend in part or wholly commercial relations with the said Government, or, in case no other remedy is available, order the arrest, and to detain in custody, *any subject or citizen of the said foreign Government* who may be found within the jurisdiction of the United States, except Ambassadors and other public Ministers, and their domestics and domestic servants, and who has not declared his intention to become a citizen of the United States; and the President shall, without delay, give information to Congress of any such proceedings under this Act ” (z).

CCCXXXI. In *Great Britain*, the law relating to Naturalization is governed by two recent statutes (a), which provide for the *status* of Aliens in the United Kingdom, and contain provisions which enable, for the first time, a British subject to renounce allegiance to the Crown, and also to resume his British nationality; also with respect to the National *status* of married women and children. The first of these statutes also gives power to the British Colonies to legislate with respect to naturalization, such legislation, however, being subject to be confirmed or disallowed by the Crown.

It may be well to observe that a foreigner naturalized in a British colony is generally entitled to the protection of the

(z) *Ann. Reg.* 1868, p. 250.

This strange reprisal, after the fashion of the First Napoleon, of seizing and imprisoning innocent foreign subjects, is novel in modern public law. It would be equivalent to a declaration of war against the State to which the subject belonged. No State has a right to dissolve the relations of native allegiance between a foreign subject and his State without that State's consent.

(a) 33 & 34 Vict. c. 14, “ An Act to amend the law relating to the legal condition of Aliens and British Subjects ” (May 12, 1870), which was preceded by the report of a Royal Commission; and 35 & 36 Vict. c. 30. The latter Act comprises in a schedule a convention between England and the United States enabling citizens of either country who had been naturalized in the other to renounce their naturalization by means of the prescribed formalities; but the provisions were but temporary, and are no longer in force.

British Government beyond the precincts of that colony, but not if he be at the time of invoking such protection in the State in which he was born.

CCCXXXII. A great difficulty has arisen with respect to the legal *status* of *liberated Africans*, who reside and trade and acquire property in the British territory at Sierra Leone; but who, not being naturalized subjects, frequently commit with impunity the offence of buying and selling slaves without the boundary of the territory. An ordinance passed the legislature of Sierra Leone (June 8, 1852) "to secure and confer upon liberated Africans the civil and political rights of natural-born British subjects;" but it was disallowed by the Crown of England, as it would appear, upon the ground that, by the instrumentality of Treaties more amply worded with the African chiefs, the provisions of the Stat. 6 & 7 Victoria, c. 98, might be made applicable to liberated Africans, though not British subjects, within the Queen's territories (*b*).

CCCXXXIII. The *Right of Jurisdiction* (*c*), Civil and Criminal, over all Persons and Things within the territorial limits, which is incident to a State relatively to its own subjects and their property, extends also, as a general rule,

(*b*) See *Papers relative to the rights of liberated Africans, and the prevention of Slave-dealing at Sierra Leone, laid before Parliament, August 12, 1853*, p. 30, &c.

(*c*) "Ad gubernationem populi moraliter necessarium est, ut qui ei vel ad tempus se admiscent, quod fit intrando territorium, ii conformes se reddant ejus populi institutis."—*Grotius*, l. ii. c. ii. s. v. p. 191.

"Pro subjectis imperii habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum sive in tempus commorantur."—*Huberus de Conflictu Legum*, l. i. t. iv. s. ii.

"In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate for them, it would seem clear upon general principles that such a right did exist."—*Story, Conflict of Laws*, s. 541.

*Wheaton, Elém.*, t. i. p. 2, c. ii. pp. 137–8.

See *Correspondence between some of the Continental Powers and Great Britain respecting the Foreign Refugees in London, presented to both Houses of Parliament by command of her Majesty*, 1852.

*De delictis Peregrinorum, eaque puniendi ratione* (Diss. Jurid. Inaug.): *Homan*, Gröning. 1823, p. 33, &c.



to *foreigners* commorant in the land (*d*). This subject has been already touched upon under the title of RIGHT TO SELF-PRESERVATION, and will be again considered in the chapter on EXTRADITION.

CCCXXXIV. With respect to the administration of Criminal Law, it must be remembered that every individual, on entering a foreign territory, binds himself by a tacit contract to obey the laws enacted in it for the maintenance of the good order and tranquillity of the realm (*e*), and it is manifestly not only the right, but the duty of a State to protect the order and safety of the society entrusted to its charge, equally against the offences of the foreigner as of the native (*f*). This proposition, it should be observed, must

(*d*) *The Peninsular and Oriental Company v. Shand*, 3 Moore P. C. Rep. N. S. pp. 390-1.

(*e*) "Quare etiamsi peregrinus cum cive paciscatur, tenebitur, illis legibus, quia qui in loco aliquo contrahit, tanquam *subditus temporarius*, legibus loci subjicitur."—*Grotius*, l. ii. c. xi. 5, 2.

"Quia actiones peregrinorum quamdiu in alieno territorio versantur, vel commorantur, subjacent legibus loci in quo sunt, si peregrini in territorio alieno delinquant juxta leges loci puniendi sunt."—*Wolff*, *Jus Gent.* s. 301.

*Vattel*, l. c. 8, 101.

*Rocco, Dell' Uso delle Leggi delle Due Sicilie*, p. 161.

*Martens*, s. 99.

*Klüber*, s. 62.

*Massé, Le Droit commerc., etc. : Devoir des Etrangers*, t. ii. p. 53, &c.

(*f*) *Martens*, s. 97.

*Tittman, Die Strafrechtspflege in völkerrechtlicher Rücksicht*, 11 (Dresden, 1817).

*Feuerbach, Lehrbuch*, 31.

*Portalis*: "Chaque Etat a le droit de veiller à sa conservation, et c'est dans ce droit que réside la souveraineté. Or comment un Etat pourrait-il se conserver et maintenir, s'il existait dans son sein des hommes qui pussent impunément enfreindre sa police et troubler sa tranquillité? Le pouvoir souverain ne pourrait remplir la fin pour laquelle il est établi, si des hommes étrangers ou nationaux étaient indépendants de ce pouvoir. Il ne peut être limité, ni quant aux choses, ni quant aux personnes. Il n'est rien s'il n'est tout. La qualité d'étranger ne saurait être une exception légitime pour celui qui s'en prévaut contre la puissance publique qui régit le pays dans lequel il réside. Habiter le territoire, c'est se soumettre à la souveraineté."—*Code civ.*: suivi de l'exposé des Motifs, t. ii. p. 12.

See *Debates in House of Lords*, February, 1858; *Ann. Reg.*, 1858;

not be confounded with another, namely, the alleged right or duty of a State to punish a *citizen* for an offence committed *without* its territory,—this is a proposition of Municipal, the other is one of International Law. The strict rule of Public Law undoubtedly is, that a State can only punish for offences committed within the limits of its territory: this is, at least, the natural and regular consequence of the territorial principle.

Nevertheless it is a pretty general maxim of European Law, that offences committed *against* their own country, by citizens in a foreign country, are punishable by their own country when they return within its confines. It is, however, clearly within the *competence* of the State, within whose territories the offence has been committed, to punish the offender, and especially if the offence has not been of a *public* character against the foreign State, but of a *private* character against a brother citizen of the offender. But in cases of a *public* character, a *double* offence is committed: *one* against the State of which the offender is a subject, *another* against the general law of the land within which the offence is devised and perpetrated. There is a *maleficiorum concursus*. Whether the State of the offender will punish him after he had been punished by the State within whose limits he committed the offence, is, as indeed the whole question is, a matter of Public rather than of International Law (*g*).

The French Law, as a general maxim, holds that *penal justice* is confined within territorial limits, but with the following exceptions (*h*):—I. A Frenchman having, out-

*Conspiracies against the Emperor of the French: et vide supra*, p. 277; *Regina v. Keyn*, L. R. 2 Ex. D., 63.

(*g*) *H. A. M. van Asch van Wijck*, *De delictis extra Regni territorium admissis*. Cf. *præsert.* cap. i. s. 4, cap. ii. s. 3, cap. iii. s. 3. (Utrecht, 1839.)

(*h*) "Tout Français qui, hors du territoire de la France, s'est rendu coupable d'un crime puni par la loi française, peut être poursuivi et jugé en France. Tout Français qui, hors du territoire de France, s'est rendu coupable d'un fait qualifié délit par la loi française, peut être poursuivi et jugé en France, si le fait est puni par la législation du pays où il a été

side the territory of France, committed an offence, for which he has not already been finally tried, is liable to prosecution on his return to France—if such offence be a “crime” as defined by French Law; or, if it be a “délit” as so defined, and also an offence punishable by the laws of the country where it was committed. II. A foreigner, and equally a Frenchman, who outside the territory of France has been guilty of a crime against the safety of that State, or of counterfeiting its Great Seal, coinage, or national paper money, is liable to prosecution either on being arrested in France, or if the Government obtain his extradition.

In the United States of North America, and in the British dominions, the rule of confining penal justice to the territory in which the offence has been committed (*i*) has been most rigidly adhered to. But the latter country has so far relaxed the severity of her adherence to this strict rule of International Law as to allow crimes of murder and man-

commis. Toute fois qu'il s'agisse d'un crime ou d'un délit, aucune poursuite n'a lieu si l'inculpé prouve qu'il a été jugé définitivement à l'étranger. En cas de délit commis contre un particulier français ou étranger, la poursuite ne peut être intentée qu'à la requête du ministère public; elle doit être précédée d'une plainte de la partie offensée ou d'une dénonciation officielle à l'autorité française par l'autorité du pays où le délit a été commis. Aucune poursuite n'a lieu avant le retour de l'inculpé en France, si ce n'est pour les crimes énoncés en l'article 7 ci-après.

“7. Tout étranger qui, hors du territoire de la France, se sera rendu coupable, soit comme auteur, soit comme complice, d'un crime attentatoire à la sûreté de l'Etat, ou de contrefaçon du sceau de l'Etat, de monnaies nationales ayant cours, de papiers nationaux, de billets de banque autorisés par la loi, pourra être poursuivi et jugé d'après les dispositions des lois françaises, s'il est arrêté en France ou si le Gouvernement obtient son extradition.”—*French Code. Code d'instruction criminelle. Dispositions préliminaires.*

“L'infraction que les lois punissent de peines de police est un *contravention*. L'infraction que les lois punissent de peines correctionnelles est un *délit*. L'infraction que les lois punissent d'une peine afflictive ou infamante est un *crime*.”—*Code pénal. Dispositions préliminaires.*

(*i*) “*Delicta puniuntur juxta mores loci commissi delicti, et non loci ubi de crimine cognoscitur.*”—*Bartolus, ad § final. lex saccularii citat. ob. in l. I., cunctos populos; C. de summo trinit. in l. questionem; and Henry on Foreign Law, p. 47.*

slaughter committed out of England, when the *offender* is a subject of the British Crown, to be tried in England (*j*).

All indictable offences committed within the Admiralty

(*j*) The former statutes relating to offences committed by British subjects in foreign States were:—

33 Hen. VIII. c. 23, repealed by 9 Geo. IV. c. 31, ss. 7, 8; the latter section applied to cases where the death, or the cause of the death only, happened in England.

Cases under 33 Henry VIII. c. 23:

*Governor Wall's case*, 28 *State Trials*, p. 51, A.D. 1802.

*Rex v. Depardo*, 1 *Taunton Rep.* p. 26; *Russell and Ryan, Crown Cases Reserved*, p. 134, A.D. 1807. Offender *Depardo* discharged because he was a foreigner.

*Rex v. Sawyer, Russell and R.* p. 294, A.D. 1815.

Cases under 9 Geo. IV. c. 31:

*Rex v. Helsham*, 4 *Carrington and Payne Rep.* p. 204.

*Rex v. M. A. de Mattos*, 7 *Carrington and Payne*, p. 458.

See remarks of Solicitor-General as to preceding case, and Mr. Justice Vaughan's charge to the jury.

In *Regina v. Lewis* (5 *Weekly Reporter*, p. 572), the prisoner and deceased being foreigners, the latter died at Liverpool from injuries inflicted by the prisoner on board a foreign ship on the high seas. Held that the prisoner had committed no offence cognizable by the law of this country.

See 7 *Cox's Criminal Law Cases*, p. 277; 2 *Dearsly & Bell Rep.* p. 182. The Act of 9 Geo. IV. c. 31 has been repealed by 24 & 25 Vict. c. 95, and it is now enacted by the 9th section of 24 & 25 Vict. c. 100, as follows:—

“Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of her Majesty or not, every offence committed by any subject of her Majesty in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place: provided, that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act.”

This section, it may be remarked, applies only to crimes committed on land.

See *Russell on Crimes*, book i. ch. 1. (vol. i. p. 10 in edition of 1877.)

Jurisdiction, that is, on the *high seas*, are offences of the same nature, and liable to the same punishment, as if they had been committed on land (*k*). These *Statutes* were necessary because, by the *Common Law*, the grand jury are sworn to inquire only for *the body of the county*, and cannot, without the help of an Act of Parliament, inquire of a fact done out of that *county* for which they are sworn (*l*).

CCCXXV. The exercise of *Civil Jurisdiction* over foreigners will be chiefly considered in Volume IV. of this work.

It will be sufficient to remark here that the Right of Jurisdiction and authority over a merely *commorant foreigner*, though he be *subditus temporarius*, does not extend to compelling him to render civil or military services; or to the power of trying or punishing a foreigner for an offence committed in a foreign land. This remark applies even where the offence has been committed against the State in which the foreign offender is now commorant; and much more forcibly against an extravagant pretension sometimes put forth, to the effect that the general powers of a State extend to punish all wrong-doers wheresoever the wrong may have been done (*m*). So long as there are different States with different laws, no single State can have a right to punish, by its own laws, citizens of another State, for offences committed in places over which it has no jurisdiction; or to punish according to what it may conceive to be the law of the place where the offence was committed.

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(*k*) Statutes relating to offences on the high seas, or in slavers, &c.:—15 Rich. II. c. 3; 28 Hen. VIII. c. 15, s. 1; 46 Geo. III. c. 54; 9 Geo. IV. c. 31, s. 32, repealed by 24 & 25 Vict. c. 95; 4 & 5 W. IV. c. 36, s. 22; 7 & 8 Vict. c. 2, ss. 1, 2, 3 & 4; 30 & 37 Vict. c. 88, ss. 5, 20; 41 & 42 Vict. c. 67, s. 6.

Statutes relating to offences committed out of England, in particular places:—57 Geo. III. c. 53; 6 & 7 Vict. c. 94; 39 & 40 Vict. c. 46; 41 & 42 Vict. c. 67.

See also *Reg. v. Keyn*, *L. R.* 2. *Ex. D.* 63, and the Act 41 & 42 Vict. c. 73, passed in consequence of the decision in that case, *supra*, p. 277.

(*l*) *Stephen's Blackstone*, vol. iv. bk. vi. ch. 18, p. 424 (Ed. 1858).

(*m*) Lord Stowell, speaking of slavery, says that it has been suggested

This assumed Jurisdiction is doubly reprehensible:—First, as being usurpation of the Rights of another State; and, secondly, as being a violation of what *Heffter* justly calls a ruling maxim (*herrschende Grundsatz*) of all constitutional States,—that no man can be withdrawn from the tribunal to which he is naturally and legally subject, and compelled to plead before another (n).

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to the Court “that this trade, if not the crime of Piracy, is nevertheless *crime*, and that every nation, indeed every individual, has not only a right, but a duty, to prevent in every place the commission of crime. It is a sphere of duty (he adds) sufficiently large that is thus opened out to communities and their members.”—*The Le Louis*, 2 *Dodson Adm. Rep.* p. 248.

(n) *Heffter*, s. 36, n.

## CHAPTER XIX.

## EXCEPTIONS TO THE TERRITORIAL RIGHT OF JURISDICTION.

CCCXXXVI. WE have now to consider certain exceptions to the sound and important rule laid down in the last chapter, which is built upon the maxim of the Roman Law, "*extra territorium jus dicenti impune non paretur*" (a).

The *First* class of exceptions to this rule is founded upon long usage and the reason of the thing, and relates principally to the *status* of Christians in Infidel countries.

So early, indeed, as the sixth century, a derogation from the rule of European International Law began to develop itself.

After the fall of the Eastern Empire, the Code of the Visigoths, not the least remarkable monument of the Middle Ages, conceded to foreign merchants the privilege of being tried by judges selected from among their own countrymen (b). But after the Ottoman Power became established in Europe, Christian nations trading with the territories subject to that Power, obtained from it, at different periods,

(a) *Dig. ii. t. 1, 20.*

(b) *Miltitz, Manuel des Consuls*, i. l. i. ch. iv. s. 2, p. 161, l. ii. ch. i. s. 1, p. 4, n. 2.

"Dum transmarini negotiatores inter se causam haberent nullus de sedibus nostris eos audire præsumat, nisi tantummodo suis legibus audiantur apud *telonarios* suos." These *Telonarii* were in fact *Prætores Peregrini*.

*Montesquieu, Esp. des Lois*, l. xxi. ch. 19.

*Amasis* (579 B. C.) is said to have permitted the Greeks established at *Naucratis* in Egypt to choose magistrates from their own nation for the decision of disputes among themselves (*Herod. ii. 179*).

a concession of exclusive authority over their own subjects, nearly identical with that which the Christian *jus commune* (c) had conceded to foreign ships of war in their ports.

The vital and ineradicable differences (d) which must always separate the Christian from the Mohammedan or Infidel, the immiscible character which their religion impresses upon their social habits, moral sentiments, and political institutions, necessitated a departure from the strict rule of Territorial Jurisdiction, in the case of Christians who founded commercial establishments in Ottoman or Infidel dominions.

With reference to this subject, however, it was observed by their Lordships of the Privy Council that, "though the *Ottoman Porte* could give, and has given, to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give, nor could give, to one such Power any Jurisdiction over the subjects of another Power. But it has left those Powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so, with the consent of their own Sovereign, and that of the Sovereign to whose tribunals they resort.

"There is no compulsory power in an English Court in *Turkey* over any but English subjects; but a Russian or any other foreigner may, if he pleases, voluntarily resort to it with the consent of his Sovereign, and thereby submit himself to its jurisdiction" (e).

(c) See this phrase frequently in the letters of Sir L. Jenkins, which contain *responsa* upon questions of Public and International Law.—*Life*, vol. ii. pp. 719–20.

(d) *Vide supra*, p. 87.

*Vide post*, vol. ii. part vii. ch. 5. "Consuls in the Levant—in China."

(e) *The Laconia*, 2 *Moore*, P. C. Rep. N. S. p. 185 (1864).

The peculiar character of the British settlement in India, as distinguished from the ordinary case of the occupation of a barbarous country by Europeans, is clearly stated in the following judgment of the same tribunal:—"Where Englishmen establish themselves in an uninhabited



CCCXXXVII. France, as early as the beginning of the sixteenth century, stipulated that her subjects throughout those districts, generally known as the *Echelles du Levant*, should be exclusively *justiciable* in criminal and civil matters before their own tribunals, and according to their own laws (*f*); and this privilege has been continued by a series of subsequent capitulations or diplomas of concession.

or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them, and become members of their community, become also partakers of, and subject to, the same laws.

"But this was not the nature of the first settlement made in *India*—it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahometan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

"If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in *India* they retained their own laws for their own government within the factories which they were permitted by the ruling powers of *India* to establish; but this was not on the ground of general international law, or because the Crown of *England* or the laws of *England* had any proper authority in *India*, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage in the case of *The Indian Chief* (3 *Rob. Adm. Rep.* p. 28).

"The laws and usages of Eastern countries, where Christianity does not prevail, are so at variance with all the principles, feelings, and habits of European Christians, that they have usually been allowed by the indulgence or weakness of the potentates of those countries to retain the use of their own laws, and their factories have for many purposes been treated as part of the territory of the sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to natives within the same limits, who remain to all intents and purposes subjects of their own sovereign, and to whom European laws and usages are as little suited as the laws of the Mahometans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them, but they are recognized in the judgment to which we have above referred."

*Adv.-Gen. of Bengal v. R. S. Dossee*, 2 *Moore, P. C. Rep.* N. S. pp. 59, 60 (1863).

See also *Dent v. Smith* L. R. 4 Q. B. 414 (1869). *Messina v. Petrocchino* L. R. 4 P. C. p. 144 (1872).

(*f*) *Ortolan, Dipl. de la Mer*, t. i. pp. 311-14.

CCCXXXVIII. The concessions by the Porte to the British Crown (*g*) began in the reign of Queen Elizabeth. A Treaty in 1675 (Art. 18) recited that British enjoyed the same privilege as French, Venetian, and other subjects. Orders of Council (*h*) and Acts of Parliament (*i*) have, at different times, prescribed the manner in which the Crown shall exercise this jurisdiction.

The Foreign Jurisdiction Act, 1843 (6 & 7 Vict. c. 94) enables her Majesty to exercise any power or jurisdiction which she now has, or hereafter may have, within any country out of her dominions, in the same manner as if she had acquired such power and jurisdiction by the cession or conquest of territory. The legislation on this subject has been continued by a series of statutes, the latest of which is the Foreign Jurisdiction Act, 1878 (41 & 42 Vict. c. 67).

Generally (*j*), it may be said, that the Consuls of Christian Powers residing in Turkey, and the Mohammedan countries of the Levant, exercise an exclusive criminal and civil jurisdiction over their fellow-countrymen. The criminal Jurisdiction is usually limited to the infliction of a pecuniary fine; in graver cases, the Consul exercises the functions of a *juge d'instruction*, collecting evidences of the crimes, and transmitting them to the tribunals of their own country (*k*).

CCCXXXVIII A.—The peculiar rights of the subjects of Christian Powers in the Ottoman dominions are founded not only upon Treaties between separate Christian States and the Porte, but upon what are called the *Capitulations*.

“The so-called Capitulations and Articles of Peace be-

(*g*) *Militz*, t. ii. 779, &c. (l. iii. c. 1, s. v. par. 29).

(*h*) *Hertlet's Treaties*, vol. vi., Orders in 1830, 1839, 1843.

(*i*) 6 & 7 Wm. IV. c. 78; 6 & 7 Vict. c. 94; 28 & 29 Vict. c. 116; 29 & 30 Vict. c. 87; 38 & 39 Vict. c. 85; 41 & 42 Vict. c. 67.

(*j*) *Wheaton*, *Elém.* i. 136.

(*k*) The laborious and valuable work of *Militz*, cited above, contains a mine of historical information upon this subject.

“ between Great Britain and the Ottoman Porte date back to  
 “ a very early period ; but they have been augmented and  
 “ altered at different times, and bear the date of 1675.  
 “ They were confirmed by the Treaty of Peace concluded  
 “ at the Dardanelles on January 5, 1809 ; by the Conven-  
 “ tion of August 16, 1838 ; and by Article I. of the Treaty  
 “ of April 29, 1861, with the exception of those clauses  
 “ which it was declared to be the object of those Treaties to  
 “ modify ” (l).

These Treaties and Capitulations are carried into effect, so far as England is concerned, by means of Orders in Council, and the establishment of Consular Courts in the Ottoman dominions and in Heathen civilized countries. It is to be observed that latterly Egypt has been practically treated as an independent State with respect to this anomalous jurisdiction ; and that special agreements on the subject have been made with her.

The Orders in Council for the regulation of Consular jurisdiction in the dominions of the Sublime Ottoman Porte are dated December 12, 1873 ; July 7, 1874 ; May 13, 1875 ; October 26, 1875 ; February 5, 1876 (m). By these Orders in Council a Supreme Consular Court is established at Constantinople, and Provincial Consular Courts are created, with rules for the exercise of Civil and Criminal Jurisdiction.

CCCXXXVIII B. With respect to Egypt, by an Order in Council of February 5, 1876, it is provided as follows :—

“ Whereas her Majesty the Queen has power and jurisdiction within that part of the dominions of the Sublime Ottoman Porte called Egypt :

“ And whereas, with the concurrence of her Majesty, Egyptian Courts have been or are about to be established as follows ; (namely,) three Courts of First Instance at

(l) *Hertslet's Treaties between Turkey and Great Britain* (1875).

(m) London : Harrison & Sons, printers to her Majesty, St. Martin's Lane.

“ Alexandria, Cairo, and Zagazig, and a Court of Appeal  
 “ at Alexandria :

“ Now, therefore, her Majesty, by virtue and in exercise  
 “ of the powers in this behalf by the Foreign Jurisdiction  
 “ Acts, 1843 to 1875, or otherwise in her vested, is pleased,  
 “ by and with the advice of her Privy Council, to order,  
 “ and it is hereby ordered, as follows :—

“ As regards all such matters and cases as arise after the  
 “ time when the Egyptian Courts aforesaid begin to sit and  
 “ act judicially, and as come within the jurisdiction of those  
 “ Courts, the operation of the Order of her Majesty the  
 “ Queen in Council for the regulation of Consular jurisdic-  
 “ tion in the dominions of the Sublime Ottoman Porte made  
 “ at Windsor December 12, 1873, and of every Order  
 “ amending the same, shall be and the same is hereby sus-  
 “ pended, until it shall seem fit to her Majesty the Queen,  
 “ by and with the advice of her Privy Council, to other-  
 “ wise order.”

“ The Queen by this Order in Council ” (says Mr. Free-  
 land) “ after referring to the three Courts of First Instance at  
 “ Alexandria, Cairo, and Zagazig, and the Court of Appeal  
 “ at Alexandria, which had been or were about to be estab-  
 “ lished, suspended, by virtue of the powers vested in her  
 “ by the Foreign Jurisdiction Acts, 1843 to 1875, the opera-  
 “ tion of a previous Order regulating Consular jurisdiction  
 “ in the dominions of the Sublime Ottoman Porte, so far as  
 “ regarded all such matters and cases as should arise after  
 “ the time when the Egyptian Courts should begin to sit  
 “ and act judicially and as should come within the juris-  
 “ diction of those Courts. The other countries parties to  
 “ the new system have acted, *mutatis mutandis*, in a similar  
 “ manner.

“ Thus, then, one main point has been gained. That  
 “ main point is: the application by a single jurisdiction, in  
 “ which foreign magistrates are in a majority, of a legislation  
 “ uniform, in so far as civil and commercial matters are con-  
 “ cerned.

“ The new tribunals are composed as follows. There are  
“ three Courts of First Instance and one Court of Appeal.  
“ Each of the former is composed of seven judges, four  
“ foreigners and three natives. The Court of Appeal com-  
“ prises eleven magistrates, seven foreigners and four natives.  
“ Decisions are given in the Courts of First Instance by five  
“ judges, three foreigners and two natives, and in the Court  
“ of Appeal by eight magistrates, five of whom foreigners  
“ and three natives. The tribunals are each of them pre-  
“ sided over by a foreign magistrate elected by themselves.  
“ In commercial suits the tribunals are assisted by two  
“ merchants, one a native and one a foreigner. The foreign  
“ assessors are elected by the commercial notables of the  
“ colony. England, France, Germany, Austria, Russia,  
“ Italy, the United States, Belgium, Holland, Norway,  
“ Denmark, Sweden, and Greece have all contributed to  
“ the judicial body.

“ The new tribunals take cognizance: 1. Of all suits  
“ affecting immovable property. 2. In matters civil or  
“ commercial, of all disputes between foreigners of different  
“ nationalities, except those affecting personal *status*. 3. In  
“ matters of police, of simple contraventions and crimes  
“ or offences committed against the magistrates and the  
“ officers of justice, while in the exercise, or arising out of  
“ the exercise, of their functions. Charges of fraudulent  
“ bankruptcy are still reserved for the Consular Courts.  
“ Certain reservations are made in favour of Consuls and  
“ their functionaries and Catholic and Protestant establish-  
“ ments.

“ The Egyptian codes which are now administered in these  
“ Courts, civil, commercial, and maritime, are compiled from  
“ the French Law. The procedure is that of France.  
“ Certain modifications in favour of brevity have been  
“ made, but, substantially, France has given to Egypt her  
“ laws, as well as the most generally used of the three judicial  
“ languages, French, Italian, and Arabic.

“ Such, in brief outline, is, and, until the year 1880,

“will be, the constitution of the new judicial system in “Egypt”(n).

CCCXXXVIIIc. I proceed to mention some of the more important Regulations with respect to English subjects generally in the dominions of the Porte. These are practically the same as those relating to other Christian States (o).

Art. IX., as to administration of Justice in Civil Suits, provides, “that in all transactions, matters, and business “occurring between the English and merchants of the “countries to them subject, their attendants, interpreters, “and brokers, and any other persons in our dominions, with “regard to sales and purchases, credits, traffic, or security, “and all other legal matters, they shall be at liberty to “repair to the judge, and there make a ‘*hoget*’ or public “authentic act, with witness, and register the suit, to the “end that, if in future any difference or dispute shall arise,

(n) See *Mr. Freeland's Paper on the Mixed Tribunals of Egypt*.

*Report of Sixth Ann. Conference of the Association for the Reform and Codification of the Law of Nations*, p. 59.

For general authorities, see *Codes égyptiens précédés du Règlement d'organisation judiciaire*. (Alexandrie: Imprimerie française, A. Mourès, Square Ibrahim, 1875.)

This includes, besides the *Règlement*, the *Code civil*, the *Code du Commerce maritime*, the *Code de Procédure*, the *Code pénal*, and the *Code d'instruction criminelle*.

(1) *Paper respecting Judicial Reforms in Egypt*, presented to Parliament 1868.

(2) *Report of the International Commission upon Consular Jurisdiction sitting at Cairo* (commonly called *Nubar Pasha's Report*), presented to the House of Lords.

(3) *Agreement between the British and Egyptian Governments respecting Judicial Reforms in Egypt*.

(4) *Order in Council*, Feb. 5, 1870, reciting the establishment of three Courts of First Instance and one Court of Appeal in Egypt, and a suspension of the previous Order of Dec. 12, 1873, and of every Order amending the same.

(5) *Treaties, &c. regulating the Trade between Great Britain and Turkey in force on Jan. 1, 1875*. By Sir Edward Hertslet, C.B. (Librarian and Keeper of the Papers, Foreign Office.)

(o) *Hertslet's Treaties regulating Trade, &c.* p. 11.

“ they may both observe the said register and ‘*hoget*,’ and  
 “ when the suit shall be found conformable thereto, it shall  
 “ be observed accordingly.

“ Should no such ‘*hoget*,’ however, have been obtained  
 “ from the judge, and false witnesses only are produced, their  
 “ suit shall not be listened to, but justice be always adminis-  
 “ tered according to the legal ‘*hoget*.’ ”

Art. XV., as to presence of interpreters at trials, provides, “ that in all litigations occurring between the  
 “ English or subjects of England and any other person, the  
 “ judges shall not proceed to hear the cause without the  
 “ presence of an interpreter, or one of his deputies.”

Art. XVI. provides, as to disputes between Englishmen, “ that if there happen any suit or other difference or  
 “ dispute amongst the English themselves, the decision  
 “ thereof shall be left to their own Ambassador or Consul,  
 “ according to their custom, without the judge or other  
 “ governors or slaves intermeddling therein.”

Art. XXIV. provides, as to the presence of the ambassador, consul, or interpreter at a trial, “ that if an  
 “ Englishman, or other subject of that nation, shall be in-  
 “ volved in any lawsuit, or other affair connected with law,  
 “ the judge shall not hear nor decide thereon until the am-  
 “ bassador, consul, or interpreter shall be present.

“ And all suits exceeding the value of 4,000 aspers shall  
 “ be heard at the Sublime Porte, and nowhere else.”

On June 18, 1867, an Imperial rescript granting to foreigners the right to hold real property in the Ottoman Empire was promulgated by the Sultan (*p*).

Art. I. of this law admits foreigners, on the same footing as Ottoman subjects and without other conditions, to the right of holding urban and rural real property throughout the whole extent of the empire, excepting the province of the Hedjaz.

Art. II. assimilates foreigners who are proprietors of real

property, urban or rural, to Ottoman subjects in all that concerns such property.

The legal effect of such assimilation is to oblige foreigners to conform to all laws and regulations governing the enjoyment, transmission, alienation, and hypothecation of landed property; to subject them to the payments of all imposts, of whatever kind, upon real property, and to render them directly amenable, either as plaintiffs or defendants, and even when both parties are foreign subjects, to the Ottoman Civil Courts in regard to all questions relating to landed property, as if they were Ottoman proprietors and without the power of availing themselves in such matters of their personal nationality. The immunities attaching, under the terms of treaties, to their persons and personal property, are, however, reserved.

Art. III. deals with the bankruptcy of foreign owners of real property, and subjects them, in respect of such property, to the jurisdiction of the Ottoman authorities and Civil Courts.

Art. IV. authorizes a foreign subject to dispose by gift or will of such part of his real property as may legally be so disposed of, and provides that the succession to real property not disposed of, or which may not legally be disposed of by gift or will, shall be governed by the Ottoman law.

The fifth and last Article provides that every foreign subject shall enjoy the benefit of the present law, so soon as the Power to which he belongs shall have acceded to the arrangements proposed by the Sublime Porte for the exercise of the rights of property.

The foregoing law was brought into force as regards British subjects by a Protocol between Great Britain and Turkey, signed at Constantinople on July 28, 1868.

This Protocol declares, that the dwelling of every person inhabiting the Ottoman territory being inviolable, and no one being entitled to enter it without the consent of its master, unless in virtue of orders issued by the competent authority, and with the assistance of the magistrate or



functionary invested with the necessary powers, the dwelling of a foreign subject is inviolable by the same right, in conformity with Treaties; and the officers of police cannot enter therein without the assistance of the Consul of the country to which the foreigner belongs, or of his delegate.

After defining the term "dwelling," and laying down certain regulations as to domiciliary visits and arrests within a dwelling by the officers of the police, the Protocol makes the following provisions as to trial procedure and appeal in respect of cases of foreign subjects in localities remote from the residences of the Consular agents:—

"In localities distant more than nine hours from the residence of the Consular Agent, and in which the law relative to the judicial organization of the vilayet shall be in force, the cases of foreign subjects shall be tried without the assistance of the Consular delegate by the Council of Ancients fulfilling the functions of judge of the peace, and by the Court of the Caza, as well in actions, the subject-matter of which shall not exceed 1,000 piastres, as in offences punishable by a fine not exceeding 500 piastres."

"Foreign subjects shall, in all cases, have the right to appeal to the Court of the Sandjak against decisions given as above described; and the appeal shall be heard and decided with the assistance of the Consul, in conformity with Treaties.

"An appeal shall always suspend execution.

"In no case can the forcible execution of decisions under the circumstances above described take place without the concurrence of the Consul or his deputy.

"The Imperial Government shall issue a law which shall determine the rules of procedure to be observed by the parties in the application of the foregoing arrangements.

"Foreign subjects, in whatever place, are authorized to make themselves voluntarily amenable to the Council of Ancients, or to the Courts of the Cazas, without the assistance of the Consul, in actions, the subject-matter of which does not exceed the competence of those Councils

“or Courts, saving, however, the right of appeal to the  
 “Court of the Sandjak, where the cause shall be heard and  
 “decided with the assistance of the Consul or his delegate.

“The consent, however, of the foreign subject to submit  
 “to the jurisdiction above described, without the assistance  
 “of the Consul, must be given in writing, and previously  
 “to any proceeding.

“It is well understood that all these restrictions do not  
 “concern suits involving a question of real property, which  
 “shall be carried on and decided under the conditions estab-  
 “lished by the law.

“The right of defence, and of publicity of hearing, are  
 “secured in all matters to foreigners who shall appear before  
 “the Ottoman Courts, as well as to Ottoman subjects.

“The preceding arrangements shall remain in force until  
 “the revision of the ancient Treaties—a revision with regard  
 “to which the Sublime Porte reserves to itself to come here-  
 “after to an agreement with friendly Powers.”

CCCXXXVIII<sup>d</sup>. I conclude this subject with observing  
 that the Treaties of Commerce and Navigation which are  
 now practically in force between England and Turkey are  
 the following (q):—

1. The Capitulations of 1675 (except in so far as they  
 have been subsequently modified).

2. The Turkish Act relating to the Black Sea, of October  
 30, 1799; and Note of July 23, 1802.

3. The Treaty of Commerce of January 5, 1809 (with  
 the exception of Articles I., II., III., and VI.)

4. The Treaty of March 30, 1856, Articles XXII. and  
 XXIII. relating to the Principalities.

5. The Convention of August 19, 1858, relating to the  
 Principalities.

6. The Treaty of Commerce and Navigation of April 29,  
 1861; and the Tariff of December 7, 1861.

7. The Protocol, relating to real property of July 28, 1868.

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(q) *Hertslet, Treaties as to Turkey and Great Britain*, p. 3.

It is stated in these Treaties and Agreements that British subjects trading with Turkey are placed upon the footing of the "most favoured nation." Many Treaties exist between Turkey and other Powers, containing clauses relating to the *coasting trade, consular privileges, the right to dispose of property by will or otherwise*, and other concessions not specially mentioned in the English Treaties ; but under the "most favoured nation" clause contained in English Treaties, the benefits of these clauses and concessions are extended to British subjects. Practically, however, no differential treatment is accorded to British merchandise or shipping, with the exception of special favours granted to certain Steam Navigation Companies in consideration of their carrying the Turkish mails.

CCCXXXIX. An Order in Council also provides for the exercise of Civil and Criminal Jurisdiction over British subjects in the dominions of the Sultan of Zanzibar. An Order in Council was also issued March 9, 1865, and rules for the execution of it May 4, 1865, concerning British subjects in China and Japan.

A Supreme Court at Shanghai, and Provincial Courts, are established by it. Regulations are made for restraint of British subjects in the cases of war, insurrection, and rebellion (*r*).

Punishment is provided for levying war or taking part in any operation of war against the Emperor of China or the Tycoon of Japan. Penalties are enacted for the violation of Treaties with these Sovereigns, and punishment is provided for piracy (*s*). Jurisdiction was also conferred over offences committed by British subjects on board Chinese or Japanese vessels, on board British vessels, or on board vessels not entitled to hoist the flag of any State, within 100 miles of the coast of China (*t*).

(*r*) S. vi. Regs. 81, 82.

(*s*) S. x. Regs. 98, 99. The Mikado is now the supreme ruler of Japan.

(*t*) S. xii. Reg. 101.

This jurisdiction has since been extended and exists now in virtue of the sixth section of 41 & 42 Vict. c. 67 (the Foreign Jurisdiction Act, 1878), which empowers the Queen in Council “from time to time, by Order, to make for the government of her Majesty’s subjects, being in any vessel at a distance of not more than 100 miles from the coast of China or of Japan, any law that to her Majesty in Council may seem meet, as fully and effectually as any such law might be made by her Majesty in Council for the government of her Majesty’s subjects being in China or in Japan.”

The fifth section of the Act last mentioned somewhat enlarges the scope of this kind of legislation by applying it to countries where there is no regular government. It enacts that—

“In any country or place out of her Majesty’s dominions in or to which any of her Majesty’s subjects are for the time being resident or resorting, and which is not subject to any government from whom her Majesty might obtain power and jurisdiction by treaty, or any of the other means mentioned in the Foreign Jurisdiction Act, 1843, her Majesty shall, by virtue of this Act, have power and jurisdiction over her Majesty’s subjects for the time being resident in or resorting to that country or place, and the same shall be deemed power and jurisdiction had by her Majesty therein within the Foreign Jurisdiction Act, 1843.”

CCCXL. The general question of Consular Jurisdiction will be discussed in the second volume (Part VII.) of this work, under the title CONSULS (*u*).

CCCXLI. The *Second* class of recognized exceptions, which entitle foreigners who are the subjects of them to be considered as morally *without*, though physically *within*,

(*u*) It would seem that the English occupation of Cyprus, already adverted to (*supra*, p. 129), is likely to give rise to difficulties in the relations of Foreign Consuls with the Porte. They naturally decline to take out an English *exequatur*.

the territorial limits, relate to foreign Sovereigns passing through or temporarily residing in the territory of another State: they are held not to be amenable to the jurisdiction, civil or criminal, of its tribunals. They represent the nation of which they are sovereigns, and being permitted to enter a foreign State are entitled, by International Law, to be considered, both as to their own person and effects, and as to those of their attendants, as being still within their own dominions (x).

*Thirdly.* The same immunity is applicable to the Ambassador or duly accredited Public Minister of a foreign State, as will be considered more at length in a later part of this work.

*Fourthly.* If a foreign army be permitted to pass through, or be stationed in, the territories of another State, the persons composing that army, or being within its lines, are entitled to extritorial privileges.

*Fifthly.* All ships, public or private, upon the high seas, are subject only to the jurisdiction of the country to which they belong (y). This last subject requires a fuller discussion.

CCCXLII. The nature and extent of these extritorial privileges will be discussed at length hereafter; it is enough, therefore, to have given a brief summary of them in this place. Those entitled to such privileges retain the domicile of their own country, with all the incidental rights affecting

(x) *Vide post*, vol. ii. part vi.

(y) *Wheaton, Elém.* i. 119, citing *Casaregis Discurs.* pp. 136-174, "Exceptis tamen ducibus et generalibus alicujus exercitus, vel classis maritimi, vel ductoribus alicujus navis militaris, nam isti in suos milites, gentem et naves, libero jurisdictionem sive voluntariam, sive contentiosam, sive civilem, sive criminalem, quod occupant *tanquam in suo proprio* exercere possunt." See the case of the *Cagliari*, *Dana's Wheaton*, 688-9. *Ann. Reg.* 1858, pp. 63-181.

As to yachts, or *bâtiments de plaisance*, see a form of International "declaration" as to their exemption from payment of duties, *Martens, cont. par Samwer*, t. xvii. 258.

their persons or property (*z*). This rule may not in every conceivable case exclude the possibility of a domicile in the country where the privileged person is residing—a domicile for certain purposes, at least. For instance, it is possible that an ambassador may be sent to the place of his *native* (*a*), or of a subsequently *acquired* (*b*) domicile; but the general rule is as has been stated (*c*).

When a person is admitted to extritorial (*d*) privileges, the things that belong to him, and the persons that form part of his household or suite, are, generally speaking, sheltered under the same immunities. These privileges exempt them from liability to the civil or criminal tribunals. It is, however, possible, that even privileged persons, by mixing themselves up with the trade or commerce of the country, or by becoming owners of immovable property therein, might of necessity be in some measure amenable to the civil tribunals.

The privilege does not extend to real or immovable property. This, like the property of a native, is subject to the municipal law of the land (*e*). The privileged person is free from the payment of taxes or duties of any kind; but not from paying the tolls upon the public ways over which he travels, or any public impost attached to the use of a public institution or thing.

CCCXLIII. The important exception (*f*) to the rule of

(*z*) *Heffter*, s. 42.

*Vide post*, vol. ii. part vi.

(*a*) As in the case of Rossi.—*Guizot's Mém.* t. vii. p. 393.

(*b*) *Heffter*, s. 42, i. n. 3, citing Treaty of Westphalia, v. 28: "Nisi forte in quibusdam locis ratione bonorum et respectu territorii vel domicili aliis statibus reperiatur subjecti."

(*c*) *Bynkershoek, de Foro Leg.* c. xi. 5, c. xviii. 6.

(*d*) See vol. ii. pt. vi. for privileges of ambassadors.

(*e*) *Heffter*, s. 42, vi.

*Wiquetfort, L'Ambassadeur*, i. 28, p. 422.

*Bynkershoek, de Foro Leg.* c. xv. 6, c. xvi.

*Merlin, Rép. Ministre public*, s. 4, 5, art. 6, 8.

(*f*) *Grotius*.

*Vattel*, l. i. c. xix. s. 216.

*Günther*, ii. 257–8, note.

International Law respecting territorial jurisdiction afforded in the instance of Foreign Ships lying in the harbours and ports of another State requires a twofold consideration—as to

1. Foreign Ships of War.

2. Foreign Ships of Commerce.

CCCXLIV. First, with respect to Foreign Ships of War (*g*).—Long usage and universal custom entitle every such ship to be considered as a part of the State to which she belongs, and to be exempt from any other jurisdiction; whether this privilege be founded upon strict International Right, or upon an original concession of Comity, with respect to the State in its aggregate capacity (*h*), which, by inveterate

*Martens.*

*Ortolan, Diplomatie de la Mer*, l. ii. ch. 9, 10, 13.

*The Schooner Exchange v. M'Faddon* 7 Cranch (*American*) Reports, pp. 135–147.

*Wheaton's Elém.* pp. 124–134.

*Kent's Commentaries*, i. 157, note *c* (ed. 1851).

*Heffter*, s. 78.

(*g*) *Klüber*, s. 55 (5): “Bei Kriegsschiffen in fremdem Seegebiet, welchen nach allgemeinem Herkommen die Ausübung der Gerichtbarkeit nach den Gesetzen ihres Staates über ihre Gerichtspflichtigen zukommen.”

“Si les enfants sont nés dans un vaisseau de la nation [*ship of war*], ils peuvent être réputés nés dans le territoire, car il est naturel de considérer les vaisseaux de la nation comme des portions de son territoire, surtout quand ils voguent sur une mer libre, puisque l'Etat conserve sa juridiction dans ces vaisseaux. Et comme, suivant l'usage communément reçu, cette juridiction se conserve sur le vaisseau, même quand il se trouve dans les parties de la mer soumises à une domination étrangère, tous les enfants nés dans les vaisseaux d'une nation seront censés nés dans son territoire. Par la même raison, ceux qui naissent sur un vaisseau étranger seront réputés nés en pays étranger, à moins que ce ne fût dans le port même de la nation; car le port est plus particulièrement du territoire, et la mère, pour être en ce moment dans le vaisseau étranger [*this must mean merchant ship*] n'est pas hors du pays.”—*Vattel*, l. c. xix. s. 216.

In another place, speaking of what is contained under the word *domaine d'une nation* he says, “et par ses possessions, il ne faut pas seulement entendre ses terres, mais tous les droits dont elle jouit.”—L. ii. ch. vii. s. 80.

It is remarkable that *Vattel* should not furnish more authority on this point than is to be found in the passages cited above.

(*h*) *Vide supra*, p. 214.

practice, has assumed the position of a Right (i), is a consideration of not *much* practical importance. But it is of *some* importance, for, if the better opinion be, as it would seem to be, that the privilege in question was originally a concession of Comity, it may, on due notice being given, be revoked by a State, so ill advised as to adopt such a course, which could not happen if it were a matter of Natural Right. But, unquestionably, in the case of the Foreign Ship of War, as of the Foreign Sovereign and Ambassador, every State which has not formally notified its departure from this usage of the civilized world, is under a tacit convention to accord this privilege to the Foreign Ship of War lying in its harbours (j).

CCCXLV. The authority of so great a jurist as Dr. Story, delivering the sentence of the Supreme Court of the United States, is of great weight in this matter. He expresses his opinion as follows:—

“ In the case of the *Exchange* (k), the grounds of the exemption of public ships were fully discussed and expounded. “ It was there shown that it was not founded upon any notion “ that a foreign Sovereign had an absolute right, in virtue of “ his sovereignty, to an exemption of his property from the “ local jurisdiction of another Sovereign, when it came within “ his territory ; for that would be to give him sovereign “ power beyond the limits of his own empire. But it stands “ upon principles of public comity and convenience, and “ arises from the presumed consent or licence of nations, that “ foreign public ships coming into their ports, and demeaning “ themselves according to law, and in a friendly manner, shall “ be exempt from the local jurisdiction. But as such consent “ and licence is implied only from the general usage of nations, “ it may be withdrawn upon notice at any time, without just

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(i) *Vide supra*, p. 215.

(j) *Vide post*, vol. ii. pt. vi.

*Vattel*, l. iv. c. vii. s. 92,

(k) *The Exchange v. M'Faddon*, 7 *Cranch (American) Reports*, p. 1151.



“ offence ; and if, afterwards, such public ships come into our  
“ ports, they are amenable to our laws in the same manner as  
“ other vessels. To be sure, a foreign Sovereign cannot be  
“ compelled to appear in our courts, or be made liable to  
“ their judgment, so long as he remains in his own dominions ;  
“ for the sovereignty of each is bounded by territorial limits.  
“ If, however, he comes personally within our limits, although  
“ he generally enjoy a personal immunity, he may become  
“ liable to judicial process in the same way, and under the  
“ same circumstances, as the public ships of the nation. But  
“ there is nothing in the Law of Nations which forbids a  
“ foreign Sovereign, either on account of the dignity of his  
“ station, or the nature of his prerogative, from voluntarily  
“ becoming a party to a suit in the tribunals of another  
“ country, or from asserting there any personal, or proprietary,  
“ or sovereign rights, which may be properly recognized and  
“ enforced by such tribunals. It is a mere matter of his own  
“ good will and pleasure; and if he happens to hold a private  
“ domain within another territory, it may be that he cannot  
“ obtain full redress for any injury to it, except through the  
“ instrumentality of its Courts of Justice. It may therefore  
“ be justly laid down as a general proposition, that all persons  
“ and property within the territorial jurisdiction of a Sove-  
“ reign, are amenable to the jurisdiction of himself or his  
“ Courts: and that the exceptions to this rule are such only  
“ as, by common usage and public policy, have been allowed,  
“ in order to preserve the peace and harmony of nations, and  
“ to regulate their intercourse in a manner best suited to their  
“ dignity and rights. It would, indeed, be strange, if a  
“ licence, implied by law from the general practice of nations,  
“ for the purposes of peace, should be construed as a licence  
“ to do wrong to the nation itself, and justify the breach of  
“ all those obligations which good faith and friendship, by  
“ the same implication, impose upon those who seek an  
“ asylum in our ports ” (1).

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(1) *The Santissima Trinidad*, 7 *Wheaton (American) Reports*, pp. 352-354.

CCCXLVI. The privilege is extended, by the reason of the thing, to boats, tenders, and all appurtenances of a ship of war, but it does not cover offences against the territorial law committed upon *shore*, though the commanders of vessels are entitled to be apprised of the circumstances attending and causes justifying the arrest of any one of their crew, and to secure to them, through the agency of diplomatic or consular ministers, the administration of justice (*m*).

CCCXLVII. *Bynkershoek* maintains that the property of a sovereign cannot be distinguished from that of a private individual, and that the tribunals of his country have laid down the law to that effect (*n*); and by way of confirmation of this doctrine, he cites a case in which certain Spanish men-of-war were seized in 1668, in the port of Flushing, as a reimbursement for certain debts of the Spanish Crown. It appears that, on the remonstrance of the Spanish ambassador, they were set free, with an intimation to the Spanish Crown that, if the debts of the Dutch subjects were not discharged, *reprisals* might not improbably be granted to them.

Whether the proposition of *Bynkershoek*, with respect to the debts of Sovereigns, be a sound maxim of International Law, will be considered in a later part of this work; but even assuming for the present a premiss which will be hereafter disputed, it is manifestly neither a logical nor a moral consequence, that because the *private property* of the sovereign may be seized, therefore the *public ships of the nation* over which he rules may be also apprehended. The case

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(*m*) *Ortolan, Dipl. de la Mer*, vol. i. pp. 291-2.

(*n*) "Sæpe cum injuria subditorum Ordines decreverunt, quod e republica esse videretur. Quo refero hanc speciem: Anno 1668, privati quidam Regis Hispanici creditores tres ejus regni naves bellicas, quæ portum Flissingensem subiverant, arresto detinuerant, ut inde ipsis satisfaceret, Rege Hispan. ad certum diem per epistolam in jus vocato ad Judices Flissingenses, sed ad legati Hispanici expostulationes Ordines Generales 12 Dec. 1668 decreverunt, Zelandiæ Ordines curare vellent, naves illæ continuo dimitterentur liberæ, admoneretur tamen per litteras Hispaniæ Regina, ipsa curare vellet, ut illis creditoribus, in causa justissima, satisfaceret, ne repressalias, quas imploraverunt, largiri tenerentur." — *Bynkershoek, de Foro Legatorum*, c. iv.

cited appears to be a solitary instance of a national violation of the general International rule, as to the immunity of foreign ships of war.

CCCXLVIII. In the case of the *Prins Frederik*, brought into the British High Court of Admiralty, the question was raised, whether a foreign ship of war was liable to be sued for salvage. Lord Stowell said: "I have considered the evidence respecting the *Dutch* line-of-battle ship belonging to his Majesty the King of the *Netherlands*, *armée en flûte*, and carrying a valuable cargo of spices, &c. from *Batavia* to the *Texel*, called the *Prins Frederik*, which was brought into *Mount's Bay* by the assistance of persons belonging to the *British* brig *Howe*, of the port of *Penzance*. These persons have since arrested this ship and cargo, by a warrant issued from the High Court of Admiralty, in a cause of salvage, on account of essential services rendered to them in a situation of imminent danger. . . . I think that the first application for a recompense, in the nature of salvage, ought, in the case of a ship of war belonging to a foreign State, to have been made to the representative of that State resident in this country. In the present case no doubt can be entertained, that just attention would have been paid to the application, and due care taken, after proper information obtained, to have answered the claim in some form or other, as substantial justice might appear to require; for it is not reasonable to suppose, that private individuals in this country should go unrewarded, for services performed to the ships of foreign Governments when they would have been liberally rewarded for similar services performed for such ships belonging to their own. At the same time, the valuation of those services is proper to be obtained, at least, in the first instance, from those Governments themselves; and it is not till after their denial of justice that recourse should be had elsewhere. Instead of this, the application is made direct to the captain of this ship, who treats it with undue disregard and defiance. I say *undue*, because at any rate some salvage was due; and

“if he personally was not liable, he ought, at least, to have  
 “informed them where the demand was to be made. On his  
 “refusal, a warrant of detainer is sued out of the Court of  
 “Admiralty, and this begets a delicate question of juris-  
 “diction in International Law, which the Court was disposed  
 “to treat with all necessary caution. The vessel is said to  
 “have been detained, under the authority of this warrant,  
 “for six months.

“Why she was not released upon bail, on an application  
 “to the Court, I know not; the Court would certainly have  
 “decreed it, if any such application had been made, *but*  
 “*without prejudice to the depending question of jurisdic-*  
 “*tion*” (o).

The question was eventually settled by arrangement; but during the course of the argument the Queen’s Advocate of that day insisted forcibly upon the general principle of International Law, which exempted all foreign ships of war from all private claims (p).

CCCXLVIII. The sound and true exposition of the law upon this point is, that every public ship of war, belonging to a State with which amicable relations subsist, is exempt from the jurisdiction of the tribunal of the State in whose territorial waters or ports she may happen to be (q).

CCCXLIX. The privilege or right does not extend in time of war to prize ships or prize goods captured by vessels fitted out in a neutral port in violation of its neutrality (r);

(o) *The Prins Frederik*, 2 *Dodson Adm. Rep.* pp. 482, 484–5.

(p) *Ib.* p. 457, &c.

(q) *The Charkieh*, *Law Rep.*, 4 *Adm. & Eccl.* p. 59.

*The Constitution*, A.D. 1879, *Law Rep.* 4 *P. D.* p. 39.

*The Parlement Belge*, A.D. 1879, decided in the Admiralty Division, *Weekly Notes*, p. 54.

The circumstances of this case were very peculiar; it is now under appeal.

(r) *The Exchange v. M’Faddon*, 7 *Cranch (American) Reports*, 116.

*The Arrogante Barcelones*, 7 *Wheaton Reports*, 496.

*The Monte Allegro*, *ib.* 520.

*Vattel*, l. i. c. xix. s. 216.

and it has been asserted on high authority, that, according to the law of the United States of North America, a writ of *habeas corpus* may be lawfully awarded to bring up a subject illegally detained on board a foreign ship in American waters (*s*). The same doctrine would probably be holden by the Courts of Great Britain.

CCCL. It is important to observe that, if any question arise as to the nationality of a ship of war, the *commission* is held to supply adequate proof. In a part of the judgment already cited, Dr. Story observes: "In general  
"the commission of a public ship, signed by the proper  
"authorities of the nation to which she belongs, is complete  
"proof of her national character. A bill of sale is not  
"necessary to be produced. Nor will the courts of a foreign  
"country inquire into the means by which the title to the  
"property has been acquired. It would be to exert the  
"right of examining into the validity of the acts of the  
"foreign sovereign, and to sit in judgment upon them in  
"cases where he has not conceded the jurisdiction, and  
"where it would be inconsistent with his own supremacy.  
"The commission, therefore, of a public ship, when duly  
"authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the Government. If

(*s*) *Opinions of the American Attorneys-General*, vol. i. pp. 25, 55, 57. *Kent, Comment.* 158, note.

See *De Martens et de Cussy, Rec. de Tr., Index*, xxxvi., tit. *Nationalité*, for catalogue of Treaties on this subject.

*Ortolan*, i. 302, &c.

“ we add to this the corroborative testimony of our own,  
 “ and the British Consul at Buenos Ayres, as well as that of  
 “ private citizens, to the notoriety of her claim of a public  
 “ character; and her admission into our own ports as a public  
 “ ship, with the immunities and privileges belonging to such  
 “ a ship, with the express approbation of our own Govern-  
 “ ment: it does not seem too much to assert, whatever may  
 “ be the private suspicion of a lurking American interest,  
 “ that she must be judicially held to be a public ship of the  
 “ country whose commission she bears” (t).

CCCLI. Secondly, with respect to merchant or private vessels, the general rule of Law is, that, except under the provisions of an express stipulation, such vessels have no exemption from the territorial jurisdiction of the harbour or port, or, so to speak, *territorial waters (mer littorale)*, in which they lie (u).

The doctrine is clearly expounded by the American Chief Justice Marshall, as follows:—

“ When private individuals of one nation spread them-  
 “ selves through another, as business or caprice may direct,  
 “ mingling indiscriminately with the inhabitants of that  
 “ other, or when merchant vessels enter for the purposes of  
 “ trade, it would be obviously inconvenient and dangerous to  
 “ society, and would subject the laws to continued infraction  
 “ and the Government to degradation, if such individuals or  
 “ merchants did not owe temporary and local allegiance, and  
 “ were not amenable to the jurisdiction of the country.  
 “ Nor can the foreign sovereign have any motive for wishing  
 “ such exemption. His subjects thus passing into foreign  
 “ countries are not employed by him, nor are they engaged  
 “ in national pursuits. Consequently, there are powerful  
 “ motives for not exempting persons of this description from  
 “ the jurisdiction of the country in which they are found,

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(t) *The Santissima Trinidad*, 7 *Wheaton (American) Reports*, pp. 335-337. “Schip is territoire.”—*Philipson*, Zwolle, 1864.

(u) *Wheaton, Elem.*, t. i. pp. 119-20.

*Wheaton, Hist.* p. 739, *Letter of Mr. Webster to Lord Ashburton*.

“and no one motive for requiring it. The implied licence, therefore, under which they enter, can never be construed “to grant such exemption” (x).

CCCLII. The jurisprudence of France upon this subject requires special notice (y).

That jurisprudence recognizes a distinction between—

1. On the one hand, acts relating solely to the internal discipline of the ship, or even to offences committed by one of the crew against another, but which do not affect generally the peace and good order of the port.

2. On the other hand, offences and crimes (*crimes ou délits*) committed by a stranger against one of the crew, or by one of the crew against the other, in a manner to disturb the peace and good order of the port.

Facts belonging to this latter class, as well as civil contracts between the crew and persons who do not belong to the crew, are clearly cognizable by the territorial tribunals.

The following instances illustrate the practical application of these principles of jurisprudence.

In 1806, *The Newton*, an American merchantman, being in the port of Antwerp, a quarrel arose between two of the crew, who were in a boat belonging to the vessel, and cognizance of the dispute was claimed by the local authorities and by the American Consul. At the same time a quarrel arose between certain of the crew of *The Sally*, an American merchantman lying in the port of Marseilles. In this case a severe wound had been inflicted by an officer of *The Sally* upon one of the men for disobedience to orders. In this case a similar conflict as to jurisdiction took place. The superior tribunal (*le Conseil d'Etat*) decided in both cases in favour of the jurisdiction of the American Consul (z).

In 1837, the Swedish vessel *Forsattning* was anchored

(x) *The Exchange v. M'Faddon*, 7 Cranch (American) Rep. p. 144.

(y) *Massé, Le Droit comm.* t. i. p. 453 (ed. 1874.)

*Ortolan, Dipl. de la Mer*, t. i. pp. 292-310.

(z) *Ortolan, ubi supra*, and Appendix, Annexe H, for judgment at length.

in the Loire, in the Painbœuf roads, and on board this vessel the crime of poisoning was committed. The Court at Rennes had some doubt as to the competence of the Swedish authority on these three grounds :—(1) that the vessel was a merchantman ; (2) that she was anchored in French waters ; (3) that there was no reciprocity between France and Sweden on the subject ; and consulted the Government, which sent an answer, drawn up under the joint authority of the *garde des sceaux* and the *ministre des affaires étrangères*, to the effect that the criminal was to be delivered up to the proper authority on board of his own ship (*a*).

These examples support the former of the two propositions of French jurisprudence stated above. The latter, which sustains the territorial jurisdiction, is illustrated by a case which happened in 1845.

In the winter of that year the *Tribunal correctionnel* at Marseilles declared itself competent to punish the captain of an English merchantman for an attack upon the master of a French vessel in the port (*b*). In harmony with these principles, the French Law gives power to French consuls to adjudicate on disputes arising on board French merchantmen when lying in foreign *ports*, but when at anchor in a foreign *roadstead* this power is given to French men-of-war, if there be any present, and, if not, to French consuls ; with an express reservation, however, of the rights of the local authorities. The power given to their own officers they consider as belonging to the category of *droits de police*, incident to every State over its merchant vessels ; the power of the local authority as belonging to the distinct category of *droits de juridiction* (*c*).

CCCLIII. These *droits de police et de juridiction* over merchantmen in foreign parts have been the subject of

(*a*) *Revue de Législ. et de Jurisprud.* février 1843, tome xvii. p. 143.  
*Massé, Le Droit comm.* t. ii. p. 63.

(*b*) *Ortolan, Dipl. de la Mer*, t. i. p. 297.

(*c*) *Ortolan*, t. i. p. 300.



various Treaties, and, though differing in various respects from each other, make on the whole an approach to a pretty general adoption of the principles laid down in the preceding paragraphs (*d*).

M. Ortolan (*e*) considers the eleventh article of the Treaty between France and the United States of North America (November 14, 1788), and the twenty-sixth article of the Treaty between Denmark and the Republic of Genoa (July 30, 1789), as containing maxims of International Law on this subject worthy of general adoption.

M. Massé (*f*), no mean authority, thinks, with M. Ortolan, that the distinction between the two kinds of offences is rightly taken and ought to be generally observed. He admits, however, that it is not generally in force, but that the simpler distinction between men-of-war and merchant-men obtains; offences on board the former being left to the jurisdiction of the ship, on board the latter to the local or territorial authority (*g*).

CCCLIV. Great Britain has made arrangements with certain foreign Powers for the recovery of seamen who *desert* from the ships of such Powers in *British* ports, and for the recovery of seamen deserting from *British* ships when in the ports of such Powers; and the hands of the British Executive have been strengthened by an Act of Parliament for such purpose; and it is competent to the Queen to declare by Order in Council that deserters from foreign ships may be apprehended and given up. Upon the publication of this order, justices of the peace must aid in the recovery of such deserters, and a penalty is imposed upon persons who harbour them (*h*).

(*d*) See *Case of the Tempest*, *Cour de Cassation*, Feb. 25, 1859, *Dalloz*, *Rép.* 1859.

(*e*) Ortolan, *Dipl. de la Mer*, t. i. pp. 391, 392.

(*f*) *Le Droit comm.* t. i. p. 454 (ed. 1874).

(*g*) Klüber, s. 53.

Wheaton, *Elém.* t. i. p. 120.

*Casaregis Disc.* 130, n. 9.

(*h*) 15 Vict. c. 26. See *post*, chapter on Extradition.

CCCLV. In one event the difference between the mercantile and military marine does not affect the question of jurisdiction; that is, when the offence has been committed on board a vessel navigating the *open sea*. In this case all authorities combine with the reason of the thing, in declaring that the territory of the country to which the vessel belongs is to be considered as the place of the offence, and in pronouncing that the offender must be tried before the tribunals of his country (*i*). It matters not whether the injured person or the offender belong to a country other than that of the vessel. The rule is applicable to all *on board*.

The principle of this rule has been carefully preserved in the conventions between France and England, which have made the Slave Trade illegal, so far as relates to their respective subjects (*j*).

The English law provided originally for the trial of such offences by the general jurisdiction of the High Court of Admiralty; but during and subsequent to the reign of Henry VIII., various statutes have been passed, appointing and regulating the tribunals which have cognizance of this crime, the last of which was passed in the reign of the late King William IV. (*k*). Particular provisions are contained in a recent statute as to the extradition of fugitive criminals, where the crime has been committed on board a vessel on the high seas, which vessel afterwards comes into a British port (*l*).

(*i*) *Vattel*, l. i. c. xix. s. 216.

*Félix*, s. 506.

*Ortolan*, t. i. p. 282.

*Wheaton*, *Elém.* t. i. p. 134.

*Kent*, *Comm.* i.

See, too, as affecting merchant vessels, *The French "Ordonnance,"* 29th October, 1833, *Art.* 15, cited by *Ortolan*, i. 283, n. Case of *The Cagliari*, *Dana's Wheaton*, pp. 688, 689.

(*j*) *Art.* 7 of the Convention of 30th November, 1831.

(*k*) 4 & 5 William IV. c. 36, s. 22, the Central Criminal Court Act. *Russell on Crimes* (ed. 1877), vol. i. pp. 10-15.

(*l*) 33 & 34 Vict. c. 52, s. 16; amended by 36 & 37, Vict. c. 60, sec. 6.

## CHAPTER XX.

## RIGHT OF JURISDICTION.—PIRATES.

CCCLVI. To whatever country the Pirate may have originally belonged, he is *justiciable* everywhere (a); his detestable occupation has made him *hostis humani generis*, and he cannot upon any ground claim immunity from the tribunal of his captor. "With professed Pirates" (Lord Stowell says) "there is no state of peace. They are the enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war" (b). The Pirate has, in fact, no national character. No captures made by them affect ownership, the rule of law being that "a piratis capta dominium non mutant." Piracy is an assault upon vessels navigated on the high seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury. If a ship belonging to an independent nation, and

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(a) See 7 Will. IV., 1 Vict. c. 88, s. 1.

*Russell on Crimes*, vol. 1 (ed. 1877), p. 255.

*Re Tronsen*, 5 *Best and Smith*, 645.

*Archbold's Criminal Law*, ed. Bruce (1871).

*Grotius*, l. iii. c. iii. 1, 2, 3; l. iii. c. ix. 16; l. ii. c. xviii. 1, 2, 3; l. ii. c. xxi. 5; l. ii. c. 17, 19-20; l. ii. c. xiii. 15; l. ii. c. xvii. 20.

*Bynkershoek, Quæst. J. P., de Piraticæ, etc.* l. i. c. xvii. xv. *in fine*.

*Loccen. de Jure Marit.* l. ii. c. iii.

*Ortolan*, t. i. c. xii. p. 240: *Des Pirates*.

*Dig. L.* t. xvi. 118; XLIX. t. xv. 10 & 24.

*Kent's Comm.* i. 186.

*Cicero de Off.* l. iii. 29, *in fine*: "Nam pirata non est in perduellionum numero definitus, sed communis hostis omnium, cum hoc nec fides debet nec jusjurandum esse commune."

(b) *The Le Louis*, 2 *Dodson Adm. Rep.* pp. 244, 246.

not a professed buccaneer, practises such conduct on the high seas, she is liable to the pains and penalties of Piracy. The law is very clearly stated by Sir L. Jenkins in a letter of advice to Mr. Secretary Williamson (1675).

“ His Majesty had, when I came from home, a controversy with *France*, in a case not much unlike yours. A French merchantman had gone out from *Rochel* to the *West Indies*, and had committed many robberies and great cruelties upon those of his crew in the voyage. He, in his return, put in at *Kingsale* for refreshment; his company accuse him; he flies, his ship and goods are confiscated as the goods of *Pirates*. This sentence was opposed by the French Ambassador, *M. Colbert*, and the cause desired to be remanded to the natural judge (as was pretended), in *France*. This produced several memorials and several answers, in which my little service was commanded; and the King and his Council were pleased to adjudge, he was sufficiently founded in point of jurisdiction, to confiscate that ship and goods, and to try capitally the person himself, had he been in hold; the matter of *Renvoy* being a thing quite disused among princes; and as every man, by the usage of our European nations, is justiciable in the place where the crime is committed, so are *Pirates*, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they are taken ” (c).

*Dr. Story*, in his judgment in *United States v. Smith*, says: “ There is scarcely a writer on the Law of Nations who does not allude to Piracy as a crime of a settled and determined nature; and whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, *animo furandi*, is Piracy ” (d).

The same very learned and able judge guards, however,

(c) *Life of Jenkins*, vol. ii. p. 714.

(d) 5 *Wheaton (American) Reports*, p. 163: the note (a) to this page contains a most learned and careful accumulation of all the authorities on the subject of Piracy.

carefully against the notion, that a mere excess of power by a lawfully commissioned ship would place her in the category of a Pirate. As to the tribunal, the mode of trial, and the punishment, it is of course competent to each country to make its own regulations. By the laws of most States Piracy is punishable by death (*e*).

CCCLVII. It has been observed in a former chapter that the municipal laws of a State, or of a number of States, cannot constitute that offence to be Piracy which is not so characterized by International Law; and memorable instances of the scrupulous severity with which this doctrine is upheld by Great Britain were adduced in the cases of the *Le Louis* (*f*), and of *Regina v. Serva* (*g*).

Piracy has indeed become infrequent in its former haunts, and, both in the Mediterranean and the West Indian Seas, appears to be nearly extinct; but in the waters of China and the Eastern Archipelago (*h*) it is continually carried on; and even if it were not, the law relating to it would form an important chapter in International Jurisprudence, as will be seen in the observations which follow upon the different kinds of privateers.

CCCLVIII. That law has been laid down with great learning and care by the Judges of the British Admiralty Courts, which are, it will be remembered, also Courts of International Law.

In a charge given at a session of Admiralty within the Cinque Ports, Sept. 2, 1668, Sir Leoline Jenkins expressed himself as follows:—

“ There are some sorts of *felonies* and *offences*, which

(*e*) See generally, 1 *Kent Comm.* p. 187, for N. American U. S. Law. *Russell on Crimes*, vol. i. ch. viii. for English Law.

*Ortolan*, l. ii. c. xii. for French Law; and *Valin*, ii. p. 236: “ Quant à la peine due aux pirates et fourbans, elle est du dernier supplice suivant l'opinion commune,” &c.

(*f*) 2 *Dodson Adm. Rep.* p. 210

(*g*) 1 *Denison, Crown Cases*, p. 104.

(*h*) *The Serhassan*, 2 *W. Rob. Adm. Reports*, pp. 354–358.

“cannot be committed anywhere else but upon the sea,  
“within the jurisdiction of the Admiralty. These I shall  
“insist upon a little more particularly, and the chiefest in  
“this kind is *Piracy*.

“You are therefore to inquire of all *Pirates and sea-rovers*;  
“they are in the eye of the law *hostes humani generis*,  
“enemies not of one nation or of one sort of people only,  
“but of all mankind. They are outlawed, as I may say, by  
“the laws of all nations, that is, out of the protection of all  
“princes and of all laws whatsoever. Everybody is com-  
“missioned, and is to be armed against them, as against  
“rebels and traitors, to subdue and to root them out.

“That which is called robbing upon the highway, the  
“same being done upon the water is called *Piracy*. Now  
“robbery, as 'tis distinguished from thieving or larceny,  
“implies not only the actual taking away of my goods,  
“while I am, as we say, in peace, but also the putting me  
“in fear, by taking them away by force and arms out of my  
“hands, or in my sight and presence; when this is done  
“upon the sea, without a lawful commission of war or  
“reprisals, it is downright *Piracy*.

“And such was the generosity of our ancient *English*,  
“such the abhorrence of our laws against *Pirates and sea-*  
“*rovers*, that if any of the King's subjects robbed or mur-  
“dered a foreigner upon our seas or within our ports, though  
“the foreigner happened to be of a nation in hostility against  
“the King, yet if he had the King's passport, or the Lord  
“Admiral's, the offender was punished, not as a felon only,  
“but this crime was made high treason, in that great Prince  
“Henry the Fifth's time; and not only himself, but all his  
“accomplices, were to suffer as traitors against the crown  
“and dignity of the King” (i).

And in a subsequent charge given at the Admiralty Sessions held at the Old Bailey, Sir Leoline Jenkins said:

“The next sort of offences pointed at in the statute, are

“*robberies*; and a robbery, when 'tis committed upon the sea, is what we call *Piracy*. A robbery, when 'tis committed upon the land, does imply three things:—1. That there be a violent assault. 2. That a man's goods be actually taken from his person, or possession. 3. That he who is despoiled be put in fear thereby.

“When this is done upon the sea, when one or more persons enter on board a ship, with force and arms, and those in the ship have their ship carried away by violence, or their goods taken away out of their possession, and are put in a fright by the assault, this is *Piracy* (j); and he that does so is a *Pirate*, or a *robber*, within the statute.

“Nor does it differ the case, though the party so assaulted and despoiled should be a foreigner, not born within the King's allegiance; if he be *de amicitia Regis*, he is *eo nomine* under the King's protection; and to rob such a one upon the sea is *Piracy*.

“Nor will it be any defence to a man, who takes away by force another's ship or goods at sea, that he hath a commission of war from some foreign prince, unless the person he takes from be a lawful enemy to that prince. 'Tis a crime in an *Englishman* to take commission from any foreign prince, that is in open war with another prince or State. 'Tis *felony* in some cases, 'tis always punishable as a great *misprision*, since his Majesty hath forbid it by various proclamations. Yet if a man do take such a commission, or serve under it, then 'tis no robbery to assault, subdue, and despoil his lawful enemy, nor yet to seize and carry away a friend, supposed to be an enemy, provided he do bring that friend, without pillaging or hurting him, or taking any composition from him, to judgment, in some port of that prince, whose commission he bears. 'Tis not only *Piracy*, when a man robs without any commission at all, but 'tis *Piracy*, when a man, having a commission, de-

(j) *Farinac*, tom. vii. *Qu.* 166, *de Furtis*, n. 7. *Vide Novell.* 134, *cap. ult.* *Farin.* *ib.* n. 29, *de Poena*, *ib.* c. 167, part i. n. 32, 3 *Jac.* c. iv.

“spoils and robs those which his commission warrants him  
 “not to fight or meddle with; such, I mean, as are *de Li-  
 “geantia vel Amicitia Domini Nostri Regis*, and also *de  
 “Ligeantia vel Amicitia* of that prince or State that hath  
 “given him his commission.

“You are therefore to inquire, if any persons have com-  
 “mitted robbery upon the sea, entering with force and arms  
 “into any ship or vessel belonging to the King’s subjects,  
 “or to the subjects of any prince or State in amity with  
 “the King, and not in war with any prince that hath given  
 “a commission to such aggressor. Or if, after such en-  
 “tering and boarding the ship or vessel, they have felo-  
 “niously carried and sailed away with the ship itself, or  
 “taken away any merchandises, or goods, tackle, apparel,  
 “or furniture out of it, thereby putting the master of such  
 “ship and his company in fear.

“You are carefully to present such persons, their names,  
 “surnames, and additions, their places of abode and occu-  
 “pation, the ships and the goods they have spoil’d and  
 “robb’d; the persons they have so assaulted and despoiled;  
 “the kinds, quantities, values of the goods they have taken  
 “away; the names and burdens of the ships or vessels they  
 “committed the *Piracy* in; and where those vessels, the  
 “goods, and the *Pirates* themselves now are; together with  
 “the time, place, manner, and circumstances, as distinctly  
 “as you can.

“You are to inquire of all such as have been accessaries  
 “to such robbers, in aiding, abetting, comforting, or re-  
 “ceiving them (*k*). For there may be accessaries in this as  
 “well as in other felonies, and they are punishable here;  
 “*Piracy* being now made *felony* by a Statute Law, and  
 “when any offence is felony, either at the Common Law or  
 “by Statute, all accessaries, both before and after, are in-  
 “cidentally included” (*l*).

(*k*) *Jac. Gothofred. de famosis Latronibus investigandis*, p. 23.

(*l*) *Life of Sir L. Jenkins*, vol. i. p. xciv.



In 1696 Sir Charles Hedges, Judge of the High Court of Admiralty, during the course of his charge to the Grand Jury, made the following observations:—

“The King of England hath not only an empire and  
 “sovereignty over the British Seas, but also an undoubted  
 “jurisdiction and power, in concurrency with other princes  
 “and States, for the punishment of all piracies and robberies  
 “at sea, in the most remote parts of the world; so that if  
 “any person whatsoever, native or foreigner, Christian or  
 “Infidel, Turk or Pagan, with whose country we have no  
 “war, with whom we hold trade and correspondence, and are  
 “in amity, shall be robbed or spoiled in the Narrow Seas;  
 “the Mediterranean, Atlantic, Southern, or any other seas,  
 “or the branches thereof, either on this or the other side of  
 “the line, it is *Piracy* within the limits of your inquiry and the  
 “cognizance of this Court (*m*). . . . . Since foreigners  
 “look upon the decrees of our courts of justice as the sense  
 “and judgment of the whole nation, our enemies will be  
 “glad to find an occasion to say, that such miscreants as  
 “are out of the protection of all laws and civil government  
 “are abetted by those who contend for the sovereignty of  
 “the seas. The barbarous nations will reproach us as being  
 “a harbour, receptacle, and a nest of pirates; and our  
 “friends will wonder to hear that the enemies of mer-  
 “chants and of mankind should find a sanctuary in this  
 “ancient place of trade. Nay, we ourselves cannot but  
 “confess, that all kingdoms and countries who have suffered  
 “by English pirates, may, for want of redress in the ordinary  
 “course, have the pretence of justice, and the colour of the  
 “laws of nations to justify their making reprisals upon our  
 “merchants, wheresoever they shall meet them upon the  
 “seas (*n*). . . . . It should be considered likewise, on  
 “the other side, that he who brings a notorious *pirate*, or  
 “common malefactor, to justice, contributes to the safety

(*m*) “*Trial of Joseph Dawson and others*,” 13 *Howell's State Trials*, p. 455 (A.D. 1696.)

(*n*) *Ibid.* p. 456.

“and preservation of the lives of many, both bad and good;  
 “of the good, by means of the assurance of protection; and  
 “of the bad too, by the terror of justice. It was upon this  
 “consideration that the Roman Emperors in their edicts  
 “made this piece of service for the public good as merito-  
 “rious as any act of piety, or religious worship.

“Our own laws demonstrate how much our legislators,  
 “and particularly how highly that great prince King Henry  
 “the Fifth, and his parliament, thought this nation concerned  
 “in providing for the security of traders, and scouring the  
 “seas of rovers and freebooters. Certainly there never was  
 “any age wherein our ancestors were not extraordinarily  
 “zealous in that affair, looking upon it, as it is, and ever  
 “will be, the chief support of the navigation, trade, wealth,  
 “strength, reputation, and glory of this nation” (o).

CCCLIX. In 1718, the Judge of the Vice-Admiralty Court at Charlestown, in South Carolina, laid down the law as to Piracy as follows:—

“Now (p) as this is an offence that is destructive of all  
 “trade and commerce between nation and nation, so it is  
 “the interest of all sovereign princes to punish and suppress  
 “the same.

“And the King of England (q) hath not only an empire  
 “and sovereignty over the British sea, but also an undoubted  
 “jurisdiction and power, in concurrency with other princes  
 “and States, for the punishment of all piracies and robberies  
 “at sea, in the most remote parts of the world.

“Now as to the nature of the offence: Piracy is a robbery  
 “committed upon the sea, and a pirate is a sea-thief.

“Indeed, the word ‘pirata,’ as it is derived from *περπαῖν*,  
 “‘transire, à transeundo mare,’ was anciently taken in a good

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(o) “*Trial of Joseph Dawson and others*,” 13 *Howell's State Trials*, p. 456.

(p) “*Trials of Major Bonnet and others for Piracy* (A.D. 1718),” 15, *Howell's State Trials*, pp. 1234–1237.

(q) See “*Sir Charles Hedges' Charge at the Trial of Dawson, &c.*,” 13 *State Trials*, p. 455. Cited and approved by the Judicial Committee of the Privy Council, *L. R.* 5 P. C. 100.

“and honourable sense (*r*), and signified a maritime knight,  
 “and an admiral or commander at sea; as appears by the  
 “several testimonies and records cited to that purpose by  
 “that learned antiquary Sir Henry Spelman in his *Glossarium*. And out of him the same sense of the word is  
 “remarked by Dr. Cowel, in his *Interpreter* (*s*); and by  
 “Blount in his *Law Dictionary* (*t*). But afterwards the  
 “word was taken in an ill sense, and signified a sea rover  
 “or robber, either from the Greek word *πείρα*, deceptio,  
 “dolus, deceit (*u*); or from the word *πειράν*, transire, of their  
 “wandering up and down, and resting in no place, but  
 “coasting hither and thither to do mischief; and from this  
 “sense, *οἱ κατὰ θάλασσαν κακούργοι*, sea-malefactors, were  
 “called *πειραταί*, pirates.”

This learned Judge also cited various authorities from the Civil Law, and from jurists, from the Statute and Common Law, and commentators thereon, the most important of which will be found in the note (*x*); and he observed that

(*r*) “*Pirata pro milite maritimo, ἀπὸ τοῦ πειράν, i.e. transire vel pervagari. Asser. Menevens. Epist. in vit. Ælfredi: Rex Ælfredus jussit cymbas et galeas, i.e. longas naves, fabricari per regnum, ut navali prælio hostibus adventantibus obviaret. Impositisque piratis in illis, vias maris custodiendas commisit. Hoc sensu archipiratam dici censeo pro nautarum præfecto, vel quem hodie admirallum nuncupamus. In quadam enim Charta Regis Edgari Cœnobio Glastoniensi confecta, an. Dom. 971, testium unus Martusin archipiratam se nominat. Annal. Gishburnenses, in Will. Rufo, cap. 1: Robertus vero comes (Normaniæ) attemptavit venire in Angliam cum magno exercitu; sed a piratis regis, qui curam maris a rege (Willielmo) susceperant, repulsus est.*”—*Spelman, Glossar.* in voce “*Pirata*,” p. 460.

Vide etiam *Selden, Mare Claus.* l. ii. c. x. p. 257.

*Engl. et Godolph. Admir. Jurisd.* c. iii. p. 25.

(*s*) In the word “*Pirata*.”

(*t*) In the word “*Pirate*.”

(*u*) See *Ridley's View of the Civil Law*, p. ii. c. i. s. 3, p. 127.

(*x*) 3 *Inst.* c. xlix. p. 113. And on *Littleton*, f. 391, a.

And see *Bridal's Jus Criminis*, pp. 70, 71.

*Coke*, 3 *Inst.* c. xlix. p. 113.

*Molloy de Jure Marit.* l. i. c. iv. s. 1, p. 51.

See *Laws of Oleron*, c. 47, in *Godolph.* in p. 211.

*Molloy*, *ib.* s. xii. p. 57.

“In odium piratarum, præter alias pœnas, statutum est ut eorum

Piracy remained a felony by the Civil Law (*y*); and therefore, though the Statute of 28 Hen. VIII. c. 15 gave a trial by the course of the Common Law, yet it altered not the nature of the offence; and the indictment must mention the same to be done “super altum mare” upon the high sea, and must have both the words “felonice” and “piratice” (*z*), and therefore that even a pardon of all felonies did not extend to this offence, but ought to be specially named.

In 1802 Lord Stowell addressed the Grand Jury as follows:—

“You are called upon to discharge the office of grand jurors for the jurisdiction of the Admiralty of England—  
“an office of great extent in point of local authority, and of  
“great importance to its operation. It extends over all  
“criminal acts done by the King’s subjects upon the sea,  
“in every part of the globe. You have to inquire of such  
“acts committed, wherever the ocean rolls; and in the  
“beneficial intercourse which now connects all the nations of

*navigia cuivis deripere liceat.*”—*Zouch, de Jure Nautico*, part i. s. x. p. 400.

“A piratis aut latronibus capti liberi permanent.”—*Dig. xlix. t. xv. xix. s. ii.*

“Qui a latronibus captus est, servus latronum non est: nec postliminium illi necessarium est.”—*Ib. 24.*

“Et quæ piratæ aut latrones nobis eripuerunt non opus habent postliminio, quia jus gentium illis non concessit ut jus Domini mutare possint. Itaque res ab illis captæ ubicunque reperiuntur vindicare possunt.”—*Grot. de Jur. Bel. ac Pac. l. iii. c. ix. s. xvi. p. 561.*

See 27 Edw. III. c. 13, p. 128.

1 *Croke*, p. 685, Anonym.

*Hobart*, pp. 78, 79, *Sir R. Bingley’s Case*, and *Edmian and Smith’s Case*, 20 Car. II.

3 *Kelle*, p. 744, pl. 11.

*Hale, Pl. Cr.* p. 77.

*Molloy*, p. 56.

*Hawkins, Pl. Cr. l. i. c. xxxvii. s. ii. p. 98.*

28 Hen. VIII. c. xv. s. 3.

(*y*) *Coke*, p. 112.

*Hale*, p. 77.

*Molloy*, b. i. c. iv. s. xxv, xxvi. p. 62.

(*z*) *Leach’s Hawk. Pl. Cr. b. i. c. 37, s. 15.*

“ the world, and of which your own country enjoys so fair a  
 “ portion, it is not needful that I should enlarge upon the  
 “ necessity of preventing, by a vigilant civil discipline, all  
 “ disorders which, by obstructing its peace and freedom,  
 “ might endanger its existence ” (a).

CCCLX. The English High Court of Admiralty was holden before a judge who was the lieutenant of the Lord High Admiral, and was a court, as appears from the foregoing extracts from the charges of judges, of criminal as well as civil jurisdiction. The authority of this Court has been supported by various statutes; but the *offences* cognizable by it have been by recent statutes (b) made also triable by a Central Criminal Court, in London, of which the Judge of the Admiralty was made, with other judges, a member, and also power has been given (c) to any judge of assize, oyer and terminer, or gaol delivery, without the issuing of a special commission required by an earlier statute (d), to inquire of and determine all *offences* committed at sea or within the Admiralty jurisdiction. The jurisdiction of the High Court of Admiralty, however, still remained for many purposes, and was in some respects enlarged by the Statute 13 & 14 Victoria c. 26; an Act upon which a construction was put in a most important case of piracy, called “ *The Magellan Pirates*.”

By virtue of the recent Judicature Acts (36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77) this authority is now exercised by what is called the Probate, Divorce and Admiralty Division of the High Court of Justice.

The case of *The Magellan Pirates* was as follows:—

Towards the latter end of 1851, there was an insurrection in some of the dominions belonging to the State of Chili; General Cruz was at the head of this insurrection, failed,

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(a) “ *Trial of William Codling and others*,” 28 *Howell's State Trials*, p. 178 (1802).

(b) 4 & 5 William IV. c. 36.  
 7 & 8 Victoria, c. 2.

(c) 7 & 8 Vict. c. 2.

(d) 28 Henry VIII. c. 15.

and retired into the country. There was a Chilian convict settlement at a place called Punta Arenas, the garrison of which consisted of 160 soldiers and 450 male convicts. An officer in that garrison raised an insurrection, and murdered the governor. In conjunction with those who conspired with him, he seized a British vessel, called *The Eliza Cornish*, and also an American vessel, called *The Florida*. They murdered the master, and Mr. Deane, part-owner of *The Eliza Cornish*, and also the owner of *The Florida*. These facts coming to the knowledge of Admiral Moresby, the commander-in-chief of that station, he despatched the *Virago*, a British steamer, under the command of Captain Houston Stewart, to the Straits of Magellan. On January 28, 1852, a vessel which proved to be *The Eliza Cornish* was described working out of the Straits; chase was made, and a shot fired across her bow, which brought her to. She was boarded, and seized by orders of Captain Stewart. She was at that time in the possession of a large number of the persons who had raised the insurrection at Punta Arenas; there were found on board her 128 men, 24 women, and 18 children. The guns were loaded, and the men were armed; they were under the command of a man named Bruno Brionis, who held a commission from Cambiaso, the leader of the insurrection. These men were afterwards delivered up to the Chilian authorities at Valparaiso. Captain Stewart proceeded in search of Cambiaso and the other insurgents, and he secured 56 at Wood's Bay. On Feb. 15, Captain Stewart discovered *The Florida* in possession of a large number of insurgents; it was said that these insurgents had, whilst at sea, risen against Cambiaso and five others, and, with the aid of the American master and crew, brought the vessel to the port where Captain Stewart had found her. On board *The Florida* was found treasure which had been plundered from *The Eliza Cornish*. All the persons on board *The Florida*, not American, were given up to the Chilian authorities. Upon this state of facts, Captain Stewart and the officers and crew of H.M.S. *Virago*, applied to the Court of Admi-

rally for a certificate, according to a provision of a recent statute, in order that they might obtain the payment of bounty for capturing these pirates in the Straits of Magellan. The Judge (e) of the High Court of Admiralty said:—

“As to the general character of these transactions, I  
 “really cannot bring myself to entertain a doubt. Even if  
 “I could be induced to adopt the distinction, that the acts  
 “in question were the acts of insurgents, I should still, even  
 “from that, adhere to the opinion that they were piratical  
 “acts: piratical acts, too, in my judgment in no degree  
 “whatsoever connected with the insurrection or rebellion,  
 “or with the intention of these parties to go to any other  
 “part of the world. They were acts in one sense of wanton  
 “cruelty, in the murder of foreign subjects, and in the  
 “indiscriminate plunder of their property. I am of opinion  
 “that the persons who did these acts were guilty of piracy,  
 “and were to be deemed pirates, unless some of the other  
 “objections which have been urged ought to prevail. It has  
 “been said that these acts were not committed on the high  
 “seas, and therefore the murder and robbery not properly or  
 “legally piratical. . . . In this case, however, the ships  
 “were carried away and navigated by the very same persons  
 “who originally seized them. Now I consider the possession  
 “at sea to have been a piratical possession, to have been a  
 “continuation of the murder and robbery, and the carrying  
 “away the ships on the high seas to have been piratical acts  
 “quite independently of the original seizure” (f).

(e) Dr. Laughton.

(f) A question arose as to the construction of 13 & 14 Vict. c. 26, which had repealed 6 Geo. IV. c. 49.

16 *Jurist*, p. 1145, *The Magellan Pirates*, contains a report of this preliminary objection. The second section of the Act enacts “that whenever any of her Majesty’s ships or vessels of war, or hired armed vessels, or any of the ships or vessels of war of the East India Company, or their boats, or any of the officers and crews thereof, shall, after the said first day of June, attack or be engaged with any persons alleged to be pirates afloat or ashore, it shall be lawful for the High Court of Admiralty of England, and for all courts of Vice-Admiralty in any dominions of her Majesty beyond the seas, including those courts of Vice-Admiralty within

With respect to the general character of piratical acts the learned Judge observed:—

“I apprehend that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts, and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our courts of common law ever thought it necessary to extend their inquiry further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly. . . . It was never, so far as I am able to find, deemed necessary to inquire whether the parties so convicted had intended to rob or to murder on the high seas indiscriminately. Though the municipal law of different countries may and does differ in many respects as to its definition of piracy, yet I apprehend that all nations agree in this, that acts such as those which I have mentioned, when committed on the high seas, are piratical acts, and contrary to the law of nations. . . . I think it does not follow that, because persons who are rebels and insurgents may commit against the ruling powers of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels and insurgents may not commit piratical acts against the subjects of other States, especially if such acts were in no degree connected with the insurrection or rebellion. Even an independent State may, in my opinion, be guilty of piratical acts. What

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the territories under the government of the East India Company, to take cognizance of and to determine whether the persons or any of them so attacked or engaged were pirates, and to adjudge what was the total number of pirates so engaged or attacked, specifying the number of pirates captured, and what were the vessels and boats engaged.” At the hearing of the case the learned judge said: “It appears to me, that in affixing a construction to this statute, I am entitled to hold that the intention of the legislature was, that acts of piracy might constitute pirates.”



“were the Barbary tribes of olden times? What many of  
 “the African tribes at this moment? It is, I believe,  
 “notorious that tribes now inhabiting the African coast of  
 “the Mediterranean will send out their boats and catch  
 “any ships becalmed upon their coasts? . Are they not  
 “pirates because, perhaps, their sole livelihood may not  
 “depend upon piratical acts? I am aware that it has  
 “been said that a State cannot be piratical, but I am  
 “not disposed to assent to such *dictum* as a universal pro-  
 “position” (g).

CCCLXA. There have been but two recent decisions of importance on this subject in the English Courts. In *Reg. v. M' Cleverty*, the *Telegrafo* or *Restauracion* (h), it was holden that a ship, sold by public auction to a *bond fide* innocent purchaser, before any proceedings against the ship had been taken on the part of the Crown, could not afterwards be arrested and condemned on account of having been previously engaged in piratical acts. The taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the ship through her transfers to various owners.

In the *Attorney General of Hong-Kong v. Kwok-a-Sing* (i), the Judicial Committee of the Privy Council adopted Sir Charles Hedges' definition of piracy, *jure gentium*, as “a robbery within the jurisdiction of the Admiralty.”

Special provisions are contained in the Order in Council of March 9, 1865, with respect to the punishment of piracy where the British subject is in China or Japan, or in the Ottoman dominions (j).

CCCLXI. It should be here observed that in time of war vessels sailing under *letters of marque* or a *national commission*,

(g) 1 *Spink's Eccl. & Adm. Rep.* p. 81.

(h) *Law Rep.* 3 P. C. 673, Feb. 1871.

(i) *Law Rep.* 5 P. C. 199, June 1873.

(j) Sec x, rules 98-9. See now 41 & 42 Vict. c. 67, s. 6.

The recent Extradition Statute, 33 & 34 Vict. c. 52, s. 16, contains special provisions with respect to the surrender of fugitive criminals who have committed crimes on the high seas.

and within the terms of that commission, are not and never have been considered as pirates by International Law (*k*). And even if they exceed the limits of their commission and commit unwarrantable acts of violence, if no *piratical* intention can be proved against them, they are responsible to and punishable by the State alone from which their commission has issued (*l*). A vessel which takes commissions from *both belligerents* is guilty of piracy, for the one authority conflicts with the other. But a nicer question has arisen with respect to a vessel which sails under two or more commissions granted by *allied Powers* against a *common enemy*. The better opinion seems to be that such practice is irregular and inexpedient, but does not carry with it the substance or the name of Piracy.

“The law” (Sir Leoline Jenkins says in the letter already cited) “distinguishes between a pirate who is a highwayman and sets up for robbing, either having no commission at all, or else hath two or three, and a lawful man-of-war that exceeds his commission.”

The question remains, what is the character affixed by the law to the vessel of a *neutral* State armed as a privateer, with a commission from the belligerent? That such a vessel is guilty of a gross infraction of International Law (*m*), that

(*k*) *Vattel*, l. iii. c. xv. s. 229.

*Klüber*, s. 260.

See Mr. Lawrence's article in the *North American Review*, 1878, p. 21.

(*l*) *Wheaton*, *Elem.* i. 141.

*Bynkershoek*, *Q. J. P.* i. c. xvii.: “Qui autem nullius principis auctoritate sive mari sive terra rapiunt piratorum prædonumque vocabulo intelliguntur. Unde, ut piratæ puniuntur, qui ad hostem deprædandum enavigant sine mandato præfecti maris et non præstitis quæ porro præstari desiderant. . . . Sed Pirata quis sit, nec ne, inde pendet an mandatum prædandi habuerit, si habuerit et arguatur id excessisse non continuo eum habuerim pro Pirata.”

(*m*) See the law laid down to this effect in the following American cases, viz. —

“*Trial of Gideon Henfield*, for illegally enlisting in a French Privateer.” In the Circuit Court of the United States for the Pennsylvania District. Philadelphia, 1793, p. 49.

she is not entitled to the liberal treatment of a vanquished enemy, is wholly unquestionable; but it would be difficult to maintain that the character of piracy has been stamped upon such a vessel by the decision of International Law. M. Ortolan admits that this position cannot be, though he desires that it should be maintained (n). At the same time States have covenanted that they will prevent their subjects, under heavy penalties, from accepting such commissions, as is seen in the Treaty of 1786 (September 26) between Great Britain and France (o); and have even

*"Trial of John Etienne Guinet, et al., for fitting out and arming a French armed vessel."* In the Circuit Court of the United States for the Pennsylvanian District. Philadelphia, 1795, p. 93.

*"Trial of Francis Villato, for entering on board a French Privateer."* In the Circuit Court of the United States for the Pennsylvanian District. Philadelphia, 1797, p. 185.

*"Trial of Isaac Williams, for accepting a Commission in a French armed vessel and serving in same against Great Britain."* In the Circuit Court of the United States for the Connecticut District. Hartford, 1799, p. 652.—*State Trials of the United States (by Wharton)*, published at Philadelphia, 1849.

(n) Ortolan, pp. 200-1: "Mais qu'il y ait là un véritable crime de piraterie de droit des gens, c'est ce qui n'est pas encore universellement reconnu."

(o) Art. III.: "On est aussi convenu, et il a été arrêté, que les sujets et habitans des royaumes, provinces et États de leurs Majestés n'exerceront à l'avenir aucuns actes d'hostilité ni violences les uns contre les autres, tant sur mer que sur terre, fleuves, rivières, ports et rades, sous quelque nom et prétexte que ce soit; en sorte que les sujets, de part et d'autre, ne pourront prendre aucune patente, commission, ou instruction pour armemens particuliers, et faire la course en mer, ni lettres vulgairement appelées de représailles, de quelques princes ou États, ennemis de l'un ou de l'autre, ni troubler, molester, empêcher ou endommager, en quelque manière que ce soit, en vertu ou sous prétexte de telles patentes, commissions ou lettres de représailles, les sujets et habitans susdits du roi de la Grande-Bretagne, ou du Roi Très-Chrétien. ni faire ces sortes d'armemens, ou s'en servir pour aller en mer. Et seront à cette fin toutes et quantes fois, qu'il sera requis de part et d'autre, dans toutes les terres, pays, et domaines quels qu'ils soient, tant de part que d'autre, renouvelées et publiées, des défenses étroites et expresses d'user, en aucune manière, de telles commissions ou lettres de représailles, sous les plus grandes peines qui puissent être ordonnées contre les infracteurs, outre la restitution et la satisfaction entière, dont ils seront

covenanted that it shall be considered by their municipal law as Piracy. Among the articles of the French *Ordonnance de la Marine*, collected by Valin, is the following:—

“Défendons à tous nos sujets de prendre commissions d’aucuns Rois, Princes au Etats étrangers, pour armer des vaisseaux en guerre, et courir la mer sous leur bannière, si ce n’est par notre permission, à peine d’être traités comme pirates” (*p*). Treaties between France and Holland, in 1662, and between France and the United States of North America, in 1778, declare such privateering carried on by the subjects of either nation to be Piracy (*q*). A similar treaty was entered into between the North American United States and Prussia (*r*) in 1785. A treaty between Denmark and the Republic of Genoa, concluded on July 30, 1789, contained a similar provision (*s*). And all the

tenus envers ceux auxquels ils auront causé quelque dommage.”—*Martens, Rec. de Tr.* vol. iv. pp. 156-7.

(*p*) L. iii. t. ix. art. iii. t. ii. p. 235.

(*q*) “Aucun sujet du Roi Très-Chrétien ne prendra de commission de lettres de marque pour armer quelque vaisseau ou vaisseaux, à l’effet d’agir comme corsaire contre les dits Etats-Unis ou quelques-uns d’entr’eux, ou contre les sujets, peuples ou habitans d’iceux, ou contre leur propriété, ou celle des habitans d’aucun d’entr’eux, de quelque prince que ce soit, avec lesquels les dits Etats-Unis seront en guerre. De même, aucun citoyen, sujet ou habitant des susdits Etats-Unis et de quelqu’un d’entr’eux, ne demandera ni n’acceptera aucune commission ou lettre de marque pour armer quelque vaisseau ou vaisseaux, pour courir sus aux sujets de S. M. T. O., ou quelqu’un d’entr’eux, ou leur propriété, de quelque prince ou Etats que ce soit, avec qui sa dite Majesté se trouvera en guerre; et si quelqu’un de l’une ou de l’autre nation prenoit de pareilles commissions ou lettres de marque, il sera puni comme pirate.”—*Martens, Rec. de Tr.* (1778), vol. ii. p. 507 (*Art. xxi.*)

(*r*) Art XX.: “Aucun citoyen ou sujet de l’une des deux parties contractantes n’acceptera d’une puissance avec laquelle l’autre pourroit être en guerre, ni commission ni lettre de marque pour armer en course contre cette dernière, sous peine d’être puni comme pirate. Et ni l’un ni l’autre des deux Etats ne louera, prêtera ou donnera une partie de ses forces navales ou militaires à l’ennemi de l’autre pour l’aider à agir offensivement ou défensivement contre l’Etat qui est en guerre.”—(10 Sept. 1785). *Martens, Rec. de Tr.* iv. p. 45.

(*s*) “Les sujets de part et d’autre ne pourront prendre ni recevoir patentes, instructions, ni commissions pour armemens particuliers, et pour

Treaties contracted by France with the American Republics contain a provision, of which the 16th Article of the Treaty with Venezuela (March 25, 1843) may serve as a sample:—

“ 16. S'il arrive que l'une des deux parties contractantes  
 “ soit en guerre avec quelque autre pays tiers, l'autre partie  
 “ ne pourra, dans aucun cas, autoriser ses nationaux à prendre  
 “ ni accepter des commissions ou lettres de marque, pour  
 “ agir hostilement contre la première, ou pour inquiéter le  
 “ commerce et les propriétés de ses sujets ou citoyens ” (t).

CCCLXII. Soon after the abdication of James II. an International question of very great importance arose, namely, what character should be ascribed to *Privateers* commissioned by the monarch, who had abdicated, to make war against the adherents of William III., or rather against the English while under his rule? The question in fact involved a discussion of the general principle, whether a deposed sovereign, claiming to be sovereign *de jure*, might lawfully commission privateers against the subjects and adherents of the sovereign *de facto* on the throne; or whether such privateers were not to be considered as Pirates, inasmuch as they were sailing *animo furandi et depredandi*, without any

faire la course en mer, ni lettres patentes appelées vulgairement lettres de représailles d'aucun prince, ou Etat ennemi de l'une ou de l'autre partie contractante. Ils ne devront jamais, en quelque manière que ce puisse être, faire valoir des semblables patentes, commissions, ou lettres de représailles d'une puissance tierce, pour troubler, molester, empêcher, ou endommager les sujets respectifs, ni faire de tels armemens et courses, sous peine d'être regardés et traités comme pirates.

“ A cette fin les hautes parties contractantes promettent réciproquement de faire publier, le cas avenant, des défenses à leurs sujets, sous les plus rigoureuses peines, d'exercer de pareilles pirateries, et si au mépris de ces mêmes défenses quelqu'un n'en commet pas moins de semblables conventions, il sera puni des peines prescrites suivant l'ordonnance émanée, et il indemniserà et dédommagera entièrement celui ou ceux, sur lesquels il auroit fait des prises.”—*Martens, Rec. de Tr.* (1789), vol. iv. pp. 447-8 (Art. xii.)

(t) *Martens, Rec. de Tr.* (1843), vol. xxxiv. p. 170.

See *Manning's Law of Nations*, p. 111, for other Treaties on this subject.

*national* character. The question, it should be observed, did not arise in its full breadth and importance until James II. had been expelled from Ireland as well as England, until, in fact, he was a sovereign, claiming to be such *de jure*, but confessedly *without territory*. It appears that James, after he was in this condition, continued to issue letters of marque to his followers. The Privy Council of William III. desired to hear civilians upon the point of the piratical character of such privateers. The arguments on both sides are contained in a curious and rather rare pamphlet, published by one (u) of the counsel (Dr. Tyndal) for King William, in the years 1693-4 (x). The principal arguments for the piratical character of the privateers appear to have been—

1. That International Law is chiefly built upon the general good of all the societies which are members of the universal community.

2. That long custom, in things indifferent, is not binding upon nations after they have publicly declared that they intend no longer to be bound by them,—instanced in the case of resident ambassadors, whom a nation might, without violation of Law, refuse to receive.

3. That nothing can more diminish from the sacredness of the Law of Nations than to allow it no other foundation than the *practice* of the generality of *sovereigns*, who often sacrifice the happiness of their own nation to the gratification of their passions.

4. That the Laws of Nations relate to their mutual commerce and correspondence, which cannot be maintained but by having recourse to those *who have the power* of making *Peace and War*, and all *Contracts* for the nations which they represent, whose acts are the acts of the whole body, and bind the members as much as if each particular person had

(u) The other was Dr. Littleton.

(x) An edition was printed in 1784 in London, "for the proprietors," after his death, to which I have referred,—"*An Essay concerning the Laws of Nations and the Rights of Sovereigns, by Matthew Tyndal, LL.D.*"

assented. That, *on account of this power*, the governors of each society are allowed certain *prerogatives* by other nations over whom they have no authority and who are no otherwise concerned with them, but as they have the power of making contracts for the nation which they govern; that therefore *de facto* Governors are recognized, as Cromwell had recently been, by other States.

5. That the leagues which princes make with one another do not oblige them to one another longer than they are in possession of their Government, because they are made on account of the power which each nation has to afford mutual assistance and benefit to another, and this reason still continues, though the person who was entrusted with authority to make them be different, the former person being then no further concerned therein than according to the Civil Law a proctor would be with a cause after the revocation of his proxy.

6. That though the sovereign of a country in which a deposed prince took refuge, might accord to him what *national* privileges he pleased, yet that he could not accord to him international privileges, which belong to those who have *summum imperium*, and not to a titular prince who in the eye of International Law is regarded as a private person. That such titular prince was in fact a subject—*subditus temporarius*—of the sovereign. What right could he claim by the *Law of Nations*, when no *nations* were in any way concerned with his actions? Because, as to foreign nations, they had only recognized him as having power to make national contracts, which power and the consequent privileges he had ceased to have. As to his own nation, that had entrusted its affairs to other hands, and was no more concerned with him than a foreign State.

7. That a necessary consequence of his being reduced to the *status* of a private person, and of not having any of the privileges which belong to those who possess *summum imperium*, was an incapacity of granting commissions to private men-of-war to disturb the trade of any nation.

8. That therefore they who acted under such commission may be dealt with as if they acted under their own authority or the authority of any private person, and therefore might be treated as pirates.

9. That if such a titular prince might grant commissions to seize the ships and goods of all or most trading nations, he might derive a considerable revenue as a chief of such freebooters, and that it would be madness in nations not to use the utmost rigour of the law against such vessels.

10. That if he could grant a commission to take the ships of a single nation, it would in effect be a general licence to plunder, because those who were so commissioned would be their own judges of whatever they took, whether it were lawful prize or not, because, in another prince's territories, whither the pretended prize must be brought, the titular and ousted prince could erect no court of judicature to judge according to Maritime and International Law concerning the property so taken. He could neither enforce the attendance of witnesses, nor the restitution of ships unjustly taken, nor provide any of the essential requisitions of justice. His own residence in the country is precarious, and at any moment he might be banished from it.

11. The sovereign into whose ports the pretended prizes would be taken, would have no legal right to adjudicate upon them, and assuming that he had the right—what if he refused to exercise it?

12. That the reason of the thing which pronounced that Robbers and Pirates, when they formed themselves into a civil society, became *just enemies*, pronounced also that a king without territory, without power of protecting the innocent or punishing the guilty, or in any way of administering justice, dwindled into a Pirate if he issued commissions to seize the goods and ships of nations; and that they who took commissions from him must be held by legal inference to have associated *sceleris causa*, and could not be considered as members of a civil society.

13. Lastly, that besides all these reasons, the persons



being Englishmen were morally incapable to take, from any king whatever, a commission to attack, in a hostile manner, the goods and ships of their fellow-subjects. The argument on the other side is thus stated by the author :—

“ The occasion of sending for the civilians, after some of them that were consulted had given their opinions in writing, was, as the Lords told Sir *Thomas Pinfold* and Dr. *Oldys* (who had declared that they were not pyrates, without offering to shew the least reason why they were of that mind), to hear what reason they had to offer for their opinion.

“ Then Sir *Thomas Pinfold* said, it was impossible they should be pyrates, for a pyrate was *hostis humani generis*, but they were not enemies to all mankind; therefore they could not be pyrates. Upon which all smiled, and one of the Lords asked him, *Whether there ever was any such thing as a pyrate, if none could be a pyrate but he that was actually in war with all mankind?* To which he did not reply, but only repeated what he had said before. *Hostis humani generis* is neither a definition, nor so much as a description of a pyrate, but a rhetorical invective to show the odiousness of that crime. As a man, who, tho’ he receives protection from a government, and has sworn to be true to it, yet acts against it as much as he dares, may be said to be an enemy to all governments, because he destroyeth, as far as in him lieth, all government and all order, by breaking all those ties and bonds that unite people in a civil society under any government: so a man that breaks the common rules of honesty and justice, which are essential to the well-being of mankind, by robbing but one nation, may justly be termed *hostis humani generis*; and that nation has the same right to punish him, as if he had actually robbed all nations.

“ Dr. *Oldys* said, that the late king, being once a king, had, by the Laws of Nations, a right to grant commissions; and that, tho’ he had lost his kingdoms, he still retained a right to the privileges that belong to Sovereign Princes.

“ It was asked him by one of the Lords, whether he could  
“ produce an author of any credit, that did affirm, that he  
“ who had no kingdom, nor right to any, could grant com-  
“ missions ; or had a right to any of those privileges, that  
“ belong to Sovereign Princes ? And that no king would  
“ suffer those privileges to be paid to CHRISTINA, when she  
“ ceased to be Queen of *Sweedland* ; and that it was the  
“ judgment of all the lawyers that ever mentioned that point,  
“ that she had no right to them ; and he did hope, that  
“ those who had sworn to their present majesties, did not  
“ believe the late king had still a right : and that that point  
“ was already determined, and would not be suffered to be  
“ debated there. To which he answered, that King JAMES  
“ was allowed very lately the *rights of a King*, and that  
“ those who acted by his commission in *Ireland* were treated  
“ as enemies ; and people that followed his fortune might  
“ still suppose he had a right, which was enough to excuse  
“ them from being guilty of piracy.

“ One of the Lords then demanded of him, If any of their  
“ majesties subjects, by virtue of a commission from the late  
“ king, should by force seize the goods of their fellow-subjects  
“ by land, whether that would excuse them from being guilty  
“ at least of robbery ? If it would not from robbery, why  
“ should it more excuse them from piracy ? To which he  
“ made no reply. Then the Lords asked Sir *Thomas Pinfold*  
“ and Dr. *Oldys*, Whether it were not treason in their ma-  
“ jesties subjects, to accept a commission from the late king  
“ to act in a hostile manner against their own nation ? Which  
“ they both owned it was (and Sir *Thomas Pinfold* has since,  
“ as I am informed, given it under his hand, that they are  
“ traytors). The Lords farther asked them, If the seizing  
“ the ships and goods of their majesties subjects were treason,  
“ why they would not allow it to be piracy ? Because  
“ piracy was nothing else but seizing of ships and goods by  
“ no commission ; or what was all one, by a void or null one,  
“ and said, that there could be no commission to commit  
“ treason, but what must be so : to which they had nothing

“ to reply, only Dr. *Oldys* pretended to quote a precedent,  
“ which he said came up to the present case, about *Antonio*  
“ king of *Portugal*, who, as he said, after he had lost his  
“ kingdom, gave commissions to privateers to seize upon all  
“ *Spanish* vessels, whom, as the *Spaniards* met with, they  
“ hanged as pyrates; (so far his precedent is against him;) <sup>f</sup>  
“ but an author (without naming him) was of opinion, as he  
“ said, That if *Antonio* had ever been a rightful king, that  
“ then the *Spaniards* ought not to have treated those who  
“ acted by his commission, as pyrates. This was all that was  
“ said by the Doctor in behalf of the late king’s privateers;  
“ upon which I must beg leave to make a few reflections.

“ As to those privileges which were allowed the late King  
“ in *Ireland*, they were not allowed him upon the account of  
“ any right, nor was it an owning that he had any right to  
“ that kingdom, but barely as he was in possession; for then  
“ he had *Rempubicam*, *Curiam*, &c., and consequently a  
“ right to be treated as an enemy; and not only he, but  
“ whoever had been in possession would have a right to have  
“ been used after the same manner; and is no more than  
“ what is practised in all civil wars, where there are just  
“ forces on either side. These privileges being allowed him  
“ when he was a public person, and in possession of a king-  
“ dom, could be no just reason to induce any to imagine, that  
“ they would be permitted him when he was reduced to a  
“ private condition; much less is it such a presumption as is  
“ sufficient to excuse them, who acted by his commission,  
“ from suffering as pyrates. The very accepting a commis-  
“ sion from him, after he was reduced to a private condition,  
“ to act against their own nation, was a demonstration that  
“ the government was no longer in his, but other hands, who  
“ could not reasonably be presumed would allow that he had  
“ still any right, or they that acted by his commission should  
“ be dealt with, as if he still had a right; but that they  
“ should be used, as if they acted by no commission, or what  
“ is all one, a null or invalid one. Their pretending to be-  
“ lieve he has still a right, is no more an excuse in the case

“ of piracy, than of treason, which every traitor may pretend to.

“ As to the story of *Antonio*, the Doctor is (to suppose “ no worse) abominably mistaken in the very foundation ; “ for they that suffered by the *Spaniards* as pirates, were “ *French*, who had not their commissions from *Antonio*, “ but from their own king, as *Albericus Gentilis*, who “ mentions this story : *Lib. i. cap. 4*, says, *At ipsa Historia “ vincat eos non fuisse Piratas, per literas quas Regis sui “ ostendebant, cui Regi serviebant, non Antonio, etsi maxime “ pro Antonio, quod illos non tangebant.* And *Conestaggius*, “ who is the historian he refers to, and who has given “ an excellent account of that war, says it was the royal “ navy of *France* (which is very improbable did act by any “ authority but that of the *French* king’s) set out, as he “ words it, *Regiis sub Auspiciis*, with which the *Spanish* fleet “ engaged, and had the good fortune, after a long and bloody “ fight, to rout it, and took above five hundred prisoners, of “ which almost the fifth part were persons of quality, whom “ the *Spanish* admiral was resolved to sacrifice as pirates, “ because the *French* king, without declaring war, had sent “ them to the assistance of *Antonio* : against which proceedings the officers of the *Spanish* fleet murmured, and “ represented to their admiral, that they were not pirates, “ because they had the *French* king’s commission ; but “ what they chiefly insisted on, was the ill consequence it “ would be to themselves, who, if they fell into the hands “ of the *French*, must expect the same usage. As to the “ *French* king’s assisting *Antonio* without declaring war, “ they supposed, that before the sea fight, the two Crowns “ might be said to be in a state of war, by reason of frequent “ engagements they had in the Low Countries. This is “ the account *Conestaggius* gives of it, which, how little it “ is to the purpose the Doctor quoted it for, is so visible, “ that there is no need of any words to show it. But granting “ (as the Doctor supposeth) that *Antonio* never had any “ right, or, at least, the *Spaniards* would never allow he had

“ any, yet it is evident from the historian, that they allowed  
 “ him, during possession, the same privileges as the late King  
 “ had during the war in *Ireland*: and if the *Spaniard*, by  
 “ the law of nations, after *Antonio* was driven from his king-  
 “ dom, might treat those that acted by his commission as  
 “ pyrates, why may not the *English* deal after the same  
 “ manner with those that act by the late king’s commission,  
 “ since they look on him to be in the same condition as the  
 “ *Spaniards* did on *Antonio*, without a kingdom, or right  
 “ to one? What difference can this make, that one had  
 “ never a right, and the other, tho’ he had once a right, has  
 “ lost it?

“ These two civilians, I believe, are the only persons,  
 “ pretending to be lawyers, who are of opinion, that a king  
 “ without a kingdom, or right to one, has, by the Law of  
 “ Nations, a right to grant commissions to privateers, espe-  
 “ cially if they are subjects (as they have acknowledged it)  
 “ to that king, against whom they, by their commissions, are  
 “ to act” (y).

This account is certainly tinged by the reporter’s hatred of Jacobites, and very probably the arguments of *Pinfold* and *Oldys* are not fully reported; but after every deduction has been made in their favour, the reason of the thing must be allowed to preponderate greatly towards the position of *Tindal*, that these Privateers were *jure gentium* Pirates (z).

(y) *Tindal’s Essay*, pp. 43–8.

(z) The law respecting Privateers is discussed in the third volume of these Commentaries, part ix. ch. vii.; part x. ch. iii.

## CHAPTER XXI.

## REVOI.—EXTRADITION.

CCCLXIII. THE subject of this chapter seems to require a threefold division; for we have to consider—

1. The Right of a State to dismiss foreigners commorant in her territories—sometimes called the right of *Renvoi* (a).

2. The Obligation of a State, under the general law, to surrender foreign subjects—or the Law of *Extradition*.

3. The Obligation of a State to surrender foreign subjects, in compliance with the provisions of *Treaties of Extradition*.

CCCLXIV. Every State is held to lie under an obligation to take charge of its natural subjects; it cannot therefore refuse to receive back citizens who have migrated in quest of food or employment into foreign countries. Correspondent with this obligation on the part of the State of the citizen, is the right of the State into which he has migrated to send the foreign citizen back to his own home.

This right is usually known in Law by the term *Droit du Renvoi* (b). At the same time it must be observed, that it

(a) *Ante*, chap. x.

(b) *Kent's Comment.* vol. i. p. 36, and note.

*Sir L. Jenkins*, speaking of the demand made by the French Crown on behalf of a French subject, charged in an English port with having committed piracy on the high seas, says: "The matter of *Renvoy* being a thing quite disused among princes, and as every man by the usage of our European nations is justiciable in the place where the crime is committed, so are pyrates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they are taken."—Vol. ii. p. 714.

*Martens*, l. iii. c. iii. s. 91.

This right is now seldom exercised but in time of war. During the

ceases, where the citizen has been naturalized, by *express law*, in the foreign country. And the right can hardly be held to exist where the naturalization has been effected by *tacit permission*. Martens thinks it would be desirable to define, by the terms of a positive treaty negotiated with every country, the cases in which the tie between the citizen and his native Government shall be held to be so severed as to destroy the obligation of receiving him again; and he observes, that the Law does not consider the character of the native subject, in this sense and for this purpose, as indelible.

This suggestion of Martens is founded upon the practice of many of the German States, who appear also to have considered the question with respect to the transmission, through intermediate States, of persons from the country in which they have been sojourning to the country of their birth (c).

CCCLXV. The *right* of a State to dismiss foreigners from its territories having been discussed, the *obligation* of a State to deliver up or surrender the subject of a foreign State on the demand of that State, is next to be considered (d).

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Franco-German war (1870) the French Government expelled resident Germans.

*Whurton's Conflict of Laws*, s. 123.

(c) *Martens*, l. iii. c. iii. s. 91.

“En effet, le gouvernement de chaque Etat a toujours le droit de contraindre les étrangers qui se trouvent sur son territoire à en sortir, en les faisant conduire jusqu'aux frontières. Ce droit est fondé sur ce que l'étranger ne faisant pas partie de la nation, sa réception individuelle sur le territoire est de pure faculté, de simple tolérance, et nullement d'obligation. L'exercice de ce droit peut être soumis, sans doute, à certaines formes par les lois intérieures de chaque pays; mais le droit n'en existe pas moins, universellement reconnu et pratiqué. En France, aucune forme spéciale n'est prescrite aujourd'hui en cette matière; l'exercice de ce droit d'expulsion est totalement abandonné au pouvoir exécutif.”—*Ortolan, Diplom. de la Mer*, l. ii. c. xiv. p. 323.

(d) *Dissertatio de Deditione Profugorum: Henricus Provo Kluit*, Utrecht, 1829.

*The Law of Extradition*, by Charles Egan: London, 1846.

1 *Kent's Comment.* 36, note.

*Ortolan, Dipl. de la Mer*, l. i. c. xiv.

*Whurton's Conflict of Laws*, s. 940 et seq.

With respect to citizens, not being fugitives from justice, but who are needed for the exigencies of their original country, it has been already stated that International Law affords no pretext for their delivery.

With respect to fugitives from justice, the doctrine of the Roman Law was explicit on this point, ordering that every criminal should be remitted to his *forum criminis*: but the reason is given by Paul Voet:—

“Jure tamen civili notandum, remissionibus locum fuisse  
 “de necessitate, ut reus ad locum ubi deliquit, sic petente  
 “judice, fuerit mittendus, quod omnes judices uni subessent  
 “imperatorii. Et omnes provinciæ Romanæ unitæ essent  
 “accessorie, non principaliter” (e). . . . . “Moribus  
 “nihilominus (non tamen Saxonice) *totius fere Christi-*  
 “*anismi*, nisi ex *humanitate*, non sunt admissæ remissi-  
 “ones, quo casu, remittenti magistratui cavendum per lit-  
 “teras reversoriales, ne actus jurisdictioni remittentis ullum  
 “pariat præjudicium. Id quod etiam in nostris Provinciis  
 “Unitis est receptum. Neque enim Provinciæ Fœderatæ  
 “uni supremo parent” (f).

CCCLXVI. Though the reason for this remission of criminals arose from the peculiar condition of universality incident to the Roman Empire, there is not wanting the authority of great jurists (g) to support as maxims of

(e) *P. Voet, De Stat.* s. xi. c. i. p. 297 (ed. 1715).

*Id.* p. 358.

(f) *Ib.* s. xi. c. i. n. 6, p. 297 (ed. 1715).

*Id.* p. 358 (ed. 1661).

(g) *Grotius*, l. ii. c. xxi. s. 3, 4, 5: “Veniamus ad questionem alteram de receptu adversus poenas. Poenas, ut ante diximus, naturaliter cuivis, cui nihil simile objici potest, exigere licet. Institutis civitatibus id quidem convenit, ut singulorum delicta, quæ ipsorum cœtum proprie spectant, ipsis ipsarumque rectoribus pro arbitrio punienda aut dissimulanda relinquerentur.

“At non etiam jus tam plenum illis concessum est in delictis, quæ ad societatem humanam aliquo modo pertinent, quæ persequi ita civitatibus aliis earumve rectoribus jus est, quomodo in civitatibus singulis de quibusdam delictis actio datur popularis: multoque minus illud plenum arbitrium habent in delictis, quibus alia civitas aut ejus rector pecu-



International Law, both the following propositions upon this question of *Extradition*:—

1. That States are under an obligation to refuse an asylum to fugitive criminals.

2. That they are bound, if satisfied by examination of the *prima facie* guilt of the fugitive, to surrender him for trial to the country in which he committed the crime.

CCCLXVII. Nevertheless, the usage of nations has not accepted these propositions; nor is the opposite view without the support of eminent jurists, such as Puffendorf (*h*), John Voet (*i*), Martens (*j*), and others (*k*).

liariter læsus est, et quo proinde nomine ille illave ob dignitatem aut securitatem suam jus habent poenæ exigendæ, secundum ea quæ ante diximus. Hoc ergo jus civitas, apud quam nocens degit, ejusve rector impedire non debet.

“Cum vero non soleant civitates permittere ut civitas altera armata intra fines suos poenæ expetendæ nomine veniat, neque id expediat, sequitur ut civitas, apud quam degit qui culpæ est compertus, alterum facere debeat, aut ut ipsa interpellata pro merito puniat nocentem, aut ut eum permittat arbitrio interpellantis; hoc enim illud est dedere, quod in historiis sæpissime occurrit. . . . Neque obstant illa adeo prædicata supplicum jure et asyloꝝ exempla. Hæc enim illis prosunt qui immerito odio laborant, non qui commiserunt quod societati humanæ aut hominibus aliis sit injuriosum.”

*Rutherford* follows *Grotius's* opinion, l. ii. c. ix. s. 12. So also *Heineccius* in his *Praelectiones*.

*Vattel*, l. ii. c. vii. pp. 75–6–7.

*Burlamaqui*, pt. iv. c. iii. ss. 23–20.

(*h*) *Puffendorf*, l. viii. c. iii. ss. 23–4.

(*i*) *Voet*, *De Statutis*, 297. So too *Klüber*, t. i. c. ii. s. 66.

(*j*) *Martens*, l. iii. ch. iii. s. 101. *De l'Extradition d'un Criminel*.

*Story*, *Conflict of Laws*, ss. 626, 627, 628, pp. 878–9–80.

As to the opinion of American lawyers, most of the reasoning on each side will be found very fully collected in the case of *In the matter of Washburn*, 4 *John. Ch. R.* 106; that of *Commonwealth v. Deacon*, 10 *Serg. & Rawl.* 123; *Holmes v. Jennison*, 14 *Peter's R.* 540–598; and that of *Rex v. Ball*, 1 *Amer. Jurist*, 997. The latter case is the decision of Mr. Chief Justice Reid of Canada. See also 1 *Amer. State Papers*, 175; *Commonwealth v. De Longchamps*, 1 *Dall.* 111, 115; *U. States v. Davis*, 2 *Summer R.* 482, 486.

1 *Kent*, *Comment.* pp. 35–38.

*Merlin*, *Questions du Droit*, tit. ETRANGER; *Répert. du Droit*, tit. SOUVERAINETÉ.

(*k*) “Profecto populum cogere ut hunc illumveprehendat nobisque

France, Russia, England, and the United States of North America, have constantly, either by diplomatic acts or decisions of their tribunals, expressed their opinion, that upon principles of International Law, irrespective of Treaty, the surrender of a foreign criminal cannot be demanded (l).

Mr. Chancellor Kent, however, expresses himself very strongly upon this subject; and, according to him, "It is the duty of Government to surrender up fugitives on demand, after the civil magistrate shall have ascertained the existence of reasonable ground for the charge, and sufficient to put the accused on his trial. For the guilty party cannot be tried and punished by any other jurisdiction than the one whose laws have been violated; therefore the duty of surrendering him applies as well to the case of the subjects of the State surrendering as to the case of the subjects of the Power demanding the fugitive" (m); and it must be admitted that the English courts, even before the Treaties and Statutes hereinafter mentioned, appear to have held the doctrine that International Comity was sufficiently stringent to compel the surrender of the criminal. In the 29th year of Charles II., we find the following decision in the *King v. Hutchinson*:

remittat, nihil aliud est, nisi illum cogere, ut faciat aliquid, ad quod jure obstringi non potest.

"Si quaeritur, quid peragatur a civitate, quæ consentit in ditionem profugi, respondemus eam tantum alteri auxilium ferre in exercitio juris quod in profugum habet. Auxilium ferre est actus benevolentiae et comitatis, ad quem præstandum nemo perfecte est obligatus."—*Kluit, de Deditione Profugorum*, c. i. s. 1.

*Tittman, in Strafrechtspf.* p. 27: "Wenn das dieser Person schuldgegebene Verbrechen mehr aus einer Verletzung des politischen Systemes, als des Rechtes jenes Staates besteht, denn ist in solchen Fällen das Strafrecht an sich selbst noch zweifelhaft."—*Ib.* c. ii. s. 10, p. 81, note.

(l) *Kluit, de Deditione Profugorum*, c. iv. ss. 1, 3.

*Heffter*, l. i. lxiii. p. 119. *Recht der Auslieferungen*.

*Felix*, l. ii. t. ix. c. 7.

*Coke's Institutes*, iii. 180.

See *Wharton's Conflict of Laws*, ss. 940-945.

(m) 1 *Kent's Commentaries*, p. 37. But see *Story on the Constitution of the United States*, s. 1808, and note 2 thereon; *Story on the Conflict of Laws*, s. 628, and *Coke's 3rd Inst.* 380.

“ On *Habeas Corpus* it appeared the defendant was committed to Newgate on suspicion of murder in Portugal, which by Mr. Attorney, being a fact out of the King’s dominions, is not triable by commission, upon 35 Henry VIII. c. 2, § 1, n. 2, but by a Constable and Marshal; and the Court refused to bail him,” &c. (n).<sup>6</sup>

In 1749, the Barons of the Exchequer said: “ The Government may send persons to answer for a crime wherever committed, that he may not involve his country; and to prevent reprisals ” (o).

In 1811, Mr. Justice Heath, sitting in the Common Pleas, observed: “ It has generally been understood that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country, against the law of which the crime was committed; and by the comity of nations, the country in which the criminal has been found has aided the police of the country against which the crime was committed, in bringing the criminal to punishment. In *Lord Loughborough’s* time the crew of a *Dutch* ship mastered the vessel, and ran away with her, and brought her into *Deal*, and it was a question whether we could seize them, and send them to Holland; and it was held we might ” (p).

When the Scotch demanded the Extradition of Bothwell, Queen Elizabeth promised either to surrender him or send him out of her kingdom.

(n) *Kelle’s Rep.* 785.

(o) *East India Company v. Campbell*, 1 *Vesey’s (Sen.) Rep.* 247.

(p) *Mure v. Kaye*, 4 *Taunton’s Rep.* 43.

As to the power of transmitting criminals from England, in which country they were apprehended, to Ireland, in which country they had committed the offence, see *Case of Lundy*, 2 *Ventris’s Rep.* p. 314, Case in the 2nd year of Will. and Mary; and *King v. Kimberley*, 2 *Strange’s Rep.* 848, Case in the 3rd year of Geo. II.

It is clear now, however, that in England the Crown has no power to surrender a fugitive criminal, unless authorized by an Act of Parliament, or a treaty sanctioned by Parliament.

See *The Attorney-General for Hong Kong v. Kwok-a-Sing*, *Law Reports*, 5 *P. C.* p. 180.

It is well known that Charles II. pursued the murderers of his father with unrelenting severity. He entered into a Treaty with Denmark (February 13, 1660), by the 5th article of which the Extradition of any of the regicides, who might take shelter in that country, was stipulated for, and three of the regicides, who had fled to Holland, were surrendered to him by De Witt, at that time Grand Pensioner. Napper Tandy, and some of his comrades concerned in the Irish rebellion of 1795–8, were arrested in Hamburg, and delivered up to the English authorities, an act which was greatly resented by Buonaparte (*q*).

There are two circumstances to be observed, which occur in these and in all other cases of Extradition (*r*):—

1. That the country demanding the criminal must be the country in which the crime is committed.

2. That the act done, on account of which his Extradition is demanded, must be considered as a crime by both States.

It may be further remarked (*s*), that the *obligation* to deliver up *native* subjects would now be denied by all States, even by those which carry the general doctrine of Extradition as to criminals to the farthest limit; and that it is generally admitted that Extradition should not be granted in the case of political offenders, but only in the case of individuals who have committed crimes against the Laws of

(*q*) Martens, *Erzählungen merkwürdiger Fälle des neueren Europ. Völkerrechts*, ii. 282.

Case of James Napper Tandy and another, *Howell's State Trials*, vol. xxvii. p. 1191.

(*r*) See *Attorney-General of Hong Kong v. Kwok-a-Sing*, *ubi sup.*

(*s*) Many States are by the positive laws of their own constitution prevented from delivering up *citizens* to foreign Powers, *e. g.* Prussia, Bavaria, Würtemberg, Baden, Hesse, Oldenburg, Brunswick, and Altenburg.

*Vide Heffter, ubi supra.*

*Felix.*

Sanfield, s. 40.

Klüber, t. i. c. ii. s. 63.

Nature, the laws which all nations regard as the foundation of public and private security (*t*).

The result of the whole consideration of this subject is, that the Extradition of criminals is a matter of *Comity*, not of *Right*, except in the cases of special convention (*u*).

CCCLXVIII. It may happen that two nations make a request (*réclamation*) for the delivery of the same offender. The only course which the State harbouring the offender is *obliged* to pursue, in such a case, is, not to show partiality to either requesting State. According to Martens, the request of the State which claims the offender as attached to her *service*, *e.g.* as an officer, or a public functionary, is preferable to the request of the country against which, or more especially in which, the crime has been committed; while, on the other hand, the request of the latter State is preferable to that of the State which claims the offender merely as an individual subject. It is hardly necessary to discuss this nice point of International casuistry, as it is clear that the wisest conduct which a State can adopt is to refuse the request of both applicants (*x*).

(*t*) *Vattel*, l. i. s. 233.

*Felix, ubi supra.*

*Wharton's Conflict of Laws*, ss. 946, 948.

*Report of Royal Commission on Extradition*, 1878, *vide post*, p. 550.

(*u*) Κατὰ τὸν κοινὸν ἀπάντων ἀνθρώπων νόμον, ὃς κεῖται τὸν φεύγοντα δέχεσθαι.—*Demosth. contra Aristocr.* 648.

(*x*) *Edinburgh Review*, No. lxxxiii. pp. 129, 139, 141.

In the case of the *Creole*, all the judicial authorities in the House of Lords expressed the same opinion. February 1842, *Hans. Par. Deb.*

Cases in the American courts:—

In the matter of *Washburn*, 4 *Johnson's Chancery Reports*, 106.

*Commonwealth v. Deacon*, 10 *Serg. & Raul.* 123.

*Rex v. Ball*, *American Jurist*, 297.

*United States v. Davis*, 2 *Sumner's Rep.* 486. Judge Story's decision.

*Holmes v. Jenison*, 14 *Peter's Reports*, 540.

*Ex parte Holmes*, 12 *Vermont's Rep.* 630.

Case of *José Ferreiro Jos Santos*, 2 *Brochenbourgh's Reports*, 492.

The result of these cases (for a reference to which I am indebted to a note in *Mr. Chancellor Kent's Commentaries*, vol. i. pp. 36, 37), seems to

**CCCLXIX.** The right of a State to demand that rebellious subjects shall not be allowed to plot against it in the territory of another State, has been already discussed (*y*); it cannot, when stretched to its utmost limit, be extended beyond the point of requiring the foreign State to send the fugitive in safety elsewhere; and this demand can only be legally made, when the State has confessed or demonstrated its inability to restrain the fugitive from carrying on plots against the country from which he has fled.

be, that the constitution of the United States confers no authority on their public officers or courts to deliver up a fugitive criminal.

See, too, *Opinions of the (American) Attorneys-General*, vol. i. pp. 384, 392, affirming the same proposition, and correcting a former opinion (vol. i. p. 46); *Story's Comment. on the Constitution*, vol. iii. pp. 675, 676; *On the Conflict of Laws*, ss. 626, 627; also *Commonwealth v. De Longchamps*, 1 Dallas, 111, 115.

"Différend survenu en 1747, entre la Cour de Suède et celle de la Grande-Bretagne au sujet de l'extradition d'un négociant nommé *Springer*, accusé de haute trahison et réfugié dans l'hôtel du ministre d'Angleterre." *Martens, Causes célèbres*, dixième Cause. *Vide post*, vol. ii. part vi. chap. viii.

In 1864, however, a Cuban criminal named Arguelles, who had escaped to New York, was surrendered by the President of the United States, at the request of the Spanish Government, although no treaty of extradition then existed between the two Powers.

An inquiry on the subject was made in the American Senate and the President sent a reply. In the House of Representatives a resolution condemning the surrender as a violation of the Constitution, and in derogation of the right of asylum, was rejected by a large majority, and the subject was referred to a committee. No further action was taken in the matter by Congress, and no decision as to the legality of the action of the President was given in the courts of the United States.

*Whurton (Conflict of Laws*, s. 943) remarks that the action of the United States in this case "assumes that it is within the province of the chief executive to cause the surrender to a foreign sovereign of a fugitive against whom there is a probable case of the commission of a gross crime recognised as such *jure gentium*. In other words, extradition, aside from treaties, is within the discretion of the sovereign, to be exercised by him in case when eminent public justice requires."

This case appears not to be considered a trustworthy precedent in the United States. See a letter from Mr. Bancroft Davis, written in the matter of one Carl Vogt, July 1873, where a contrary view is upholden (*Papers relating to the Foreign Relations of the United States*, 1873, vol. i. p. 21).

(*y*) See chap. x.

This very important subject underwent a memorable discussion a few years ago in the House of Peers. In a debate which arose upon the question of foreign refugees, most of the Lords, who were either then discharging, or who had discharged judicial functions in the highest tribunals of the realm, delivered their opinions upon this nice question of International Law.

Lord Lyndhurst introduced the subject by referring to the great irritation which prevailed at Vienna, and throughout the Austrian dominions, with respect to the alleged conduct, in London, of certain refugees from the Lombardic dominions of Austria. It will be very difficult to abridge without injuring the clear exposition both of our National and International Law laid down by that eminent and learned nobleman. He stated that Law, with respect both to British subjects and to foreign refugees, in these words :

“ I will first take the case of a British subject. If a  
“ number of British subjects were to combine and conspire  
“ together to excite revolt among the inhabitants of a  
“ friendly State—of a State united in alliance with us—  
“ and these persons, in pursuance of that conspiracy, were  
“ to issue manifestoes and proclamations for the purpose of  
“ carrying that object into effect ; above all, if they were to  
“ subscribe money for the purpose of purchasing arms to  
“ give effect to that intended enterprise, I conceive, and I  
“ state with confidence, that such persons would be guilty  
“ of a misdemeanor, and liable to suffer punishment by the  
“ laws of this country, inasmuch as their conduct would tend  
“ to embroil the two countries together, to lead to remon-  
“ strances by the one with the other, and ultimately, it  
“ might be, to war. I think my noble and learned friends  
“ who are now assembled here, and who perform so im-  
“ portant a part in the deliberations of this House, will not  
“ dissent from the opinion I state with respect to British  
“ subjects. Now with respect to foreigners. Foreigners  
“ residing in this country, as long as they reside here under  
“ the protection of this country, are considered in the light

“ of British subjects, or rather subjects of her Majesty, and  
 “ are punishable by the criminal law precisely in the same  
 “ manner, to the same extent, and under the same conditions,  
 “ as natural-born subjects of her Majesty. In cases of this  
 “ kind, persons coming here as refugees from a foreign State  
 “ in consequence of political acts which they have committed,  
 “ are bound by every principle of gratitude to conduct  
 “ themselves with propriety. This circumstance tends  
 “ greatly to aggravate their offence, and no one can doubt  
 “ that they are liable to severe punishment. I will put the  
 “ case in another shape. The offence of endeavouring to  
 “ excite revolt against a neighbouring State is an offence  
 “ against the Law of Nations. No writer on the Law of  
 “ Nations states otherwise. But the Law of Nations,  
 “ according to the decision of our greatest judges, is part of  
 “ the law of England. I need say no more with reference  
 “ to the nature of the offence imputed to those individuals—  
 “ I need say no more than that they are subject to be  
 “ punished by the laws of this country for offences of this  
 “ description. But there is a question connected with this  
 “ subject of considerable difficulty, and that relates to the  
 “ evidence by which a party can be convicted. Here, I  
 “ admit, there is a very serious difficulty. It is not sufficient  
 “ that the offence should be notorious to the world. You  
 “ must have such evidence to support the particular charge  
 “ as shall be admissible before our tribunals” (z).

In the course of the debate, the Prime Minister stated that the Government had resolved, if any event occurred which gave just grounds of complaint to a foreign Government against a refugee in this country, to take upon themselves the prosecution of such an individual, and not to throw the burden of it upon the foreign minister. The principal occasions upon which such a course has been pursued are the following:

In 1799, certain English subjects were prosecuted for

(z) *Vide The Times*, 5th March, 1853.

*Hansard's Parl. Deb.* vol. cxxiv. p. 1046.



publishing a libel upon Paul I., Emperor of Russia. The Attorney-General in that case said that he had been commanded to file an information in order to vindicate the character of the Emperor of Russia—a prince in amity with this country, defamed in a libel, contrary to the laws and usual policy of nations, which protect not only the magistracies, but the individuals of each other, from insult and reproach. Lord Kenyon tried the case, and, though Erskine defended the prisoners, the jury found them guilty. They were punished by fine and imprisonment (*a*). Lord George Gordon was found guilty of libelling Marie Antoinette, the consort of a Sovereign an ally of this kingdom.

In 1803, Jean Peltier, a French refugee, was prosecuted for a libel on Napoleon Buonaparte, then First Consul of the French Republic: Lord Ellenborough tried the case, and, in spite of an extraordinary speech delivered by Mackintosh, the jury found Peltier, his client, guilty; but as war, soon after this trial, was renewed between Great Britain and France, the defendant was never called upon to receive judgment (*b*).

In 1858, a conspiracy against the life of Napoleon III., planned in London, excited much debate on the Continent and in England on the state of our Criminal Law with respect to crimes committed by foreigners commorant here against foreign Sovereigns and allies. An attempt to alter or amend the existing law was fatal to the Government of Lord Palmerston, which introduced a Bill for that purpose. All the legal authorities—and they were of a very high order—in the House of Lords expressed their clear opinion that the foreigner was as amenable as a British subject to our jurisdiction for offences committed in this country, and that to conspire the murder of a foreign Sovereign or his consort was an offence cognizable by our law (*c*). In the same year one Bernard was tried on a charge of being an accessory before the fact to a plot for assassinating the

(*a*) *Howell's State Trials*, vol. xxvii. pp. 627–630.

(*b*) *Ib.* vol. xxviii. pp. 630–610.

(*c*) See *Hansard's Parl. Deb.* for 1858. *Ann. Reg.* 1858, pp. 32–4.

Emperor of the French, which caused the murder of one of his guards. He was acquitted, whether justly or not is not to be considered in this place (*d*).

CCCLXX. The delicate question of the protection afforded to native offenders, by the residence of persons entitled to the privilege of *extritoriality*, will be considered hereafter.

CCCLXXI. We have now to consider (*e*) the principal Treaties upon the subject of Extradition, which form an important part of Positive International Law between the contracting parties, and cannot but have, from their number, and from the variety of States which have entered into them, an important general bearing upon this question of International Jurisprudence.

CCCLXXII. In France (*f*), the matter of Extradition has been frequently the subject of domestic legislation and of treaty with other Powers.

With regard to the former, some doubt seems to exist as to the present legal effect of enactments and provisions made before the year 1831 (*g*).

The first Treaty, by which France promised and stipulated for Extradition, was concluded between that country and Spain, in 1765 (*h*). The second was entered into with the Duchy of Würtemberg, in the same year (*i*). According to the terms of the latter Treaty, the subjects of Extradition are to be "brigands, malfaiteurs, voleurs, incendiaires, meurtriers, assassins, vagabonds."

(*d*) *Ann. Reg.* 1858, p. 310.

1 *Foster and Finlason*, 240.

(*e*) *De M. et de C., Tr., Index*, tit. EXTRADITION.

(*f*) *Felix*, l. ii. t. ix. c. 7. A remarkably clear and complete exposition of the principles adopted by the Government of France in this respect is given in a circular of the 5th of April, 1841, sent by the French Minister of Justice to the Procureur-General, *Hertault's Commercial Treaties*, xiii. 385. It will be found in the Appendix.

(*g*) *Felix ib.* pp. 586, 592, s. 612 and note.

(*h*) It does not appear in the general collections.

(*i*) *Martens, Rec. de Traité*s, t. i. p. 310.

In 1783 (*j*), France became a third party to a Treaty concluded between Spain and Portugal in 1778 (*k*), the sixth Article of which stipulated for the mutual Extradition of natives accused of counterfeiting coin, contrabandists, and deserters. The stipulations with respect to deserters were renewed by the sixteenth Article of a Treaty between France and Spain, made in 1786 (*l*).

By a Treaty concluded between France and Switzerland in August 1798 (fourteenth Article), and renewed in September 1803 (eighteenth Article), it was stipulated (*m*), —“ Si les *individus* qui seroient déclarés juridiquement  
“ coupables de crimes d’Etat, assassinats, empoisonnemens,  
“ faux sur des actes publics, fabrication de fausse monnoye,  
“ vols avec violence ou effraction, ou qui seroient poursuivis  
“ comme tels en vertu de mandats décernés par autorité  
“ légale, se réfugioient d’un pays dans l’autre, leur extradition sera accordée à la première réquisition. Les choses  
“ volées dans l’un des deux pays, et déposées dans l’autre,  
“ seront fidèlement restituées, et chaque Etat supportera,  
“ jusqu’aux frontières de son territoire, les frais d’extradition  
“ et de transport. Dans le cas de délits moins graves, mais  
“ qui peuvent emporter peine afflictive, chacun des deux  
“ Etats s’engage, indépendamment des restitutions à opérer,  
“ à punir lui-même le délinquant; et la sentence sera communiquée à la légation françoise en Suisse, si c’est un  
“ citoyen françois, et réciproquement à l’envoyé helvétique  
“ à Paris, ou, à son défaut, au land-amman de la Suisse,  
“ si la punition pesoit sur un citoyen de la Suisse.” It provides also for the Extradition of public functionaries or receivers of public moneys pursued for carrying away the property of the State.

(*j*) *Martens, Rec de Traités*, t. ii. p. 612.

(*k*) *Ib.* p. 625.

(*l*) *Ib.* t. iv. p. 187.

(*m*) *Ib.* t. vi. p. 466; t. viii. p. 132; *Art. xviii.* Renewed on the 18th of July, 1828, according to *Félix*, 585.

Stipulations to the same effect were inserted in the Treaty of Amiens in 1802 (Article Twenty), between England and France (*n*); and also in a Treaty between the same parties in February 1843.

Treaties between France and England, in August 1787 and March 1815 (Articles Eight and Nine), contained reciprocal stipulations for the surrender of persons accused of offences cognizable in courts of law within their respective possessions in the East Indies (*o*).

CCCLXXIII. It appears to have been the usage of the kingdom of the *Two Sicilies* to concede Extradition; but they had a positive Treaty, of July 1818, on the subject, with the Pope, for the surrender of all delinquents, with power for an armed force of the one country to make arrests within the territory of the other (*p*).

The kingdom of the *Two Sicilies* had a Treaty, of May 1819, with *Sardinia* (*q*), for the delivery of individuals condemned to the galleys, or to temporary or perpetual labour.

The *Papal States* had the Treaty above mentioned with *Sardinia*.

CCCLXXVI. *Austria* (*r*), which incorporates into its own code the power and obligation of Extradition, entered into a Treaty for the surrender of individuals accused of crimes or misdemeanours (*crimes ou délits communs*) with *Sardinia* as early as April 1792 (*s*).

(*n*) *Martens, Rec. de Traités*, t. vii. p. 412.

(*o*) *Martens, Rec. de Traités*, t. iv. pp. 280–285. This ninth article of the Treaty of 1815, relating to East India, is expressly recognised and confirmed by the recent Anglo-French Extradition Treaty, signed at Paris on August 14, 1876.

(*p*) *Martens, Nouv. Rec.* t. v. p. 281.

(*q*) *Martens, Nouv. Rec.* t. v. p. 398.

(*r*) *Felix*, pp. 592, 593, 594.

*De Puttlingen, Die gesetzliche Behandlung der Ausländer in Oesterreich.*

*Klüber, Öffentliches Recht des deutschen Bundes und der Bundesstaaten*, ss. 197, 347.

Sections cccclxxiv. and cccclxxv. of the last edition are omitted in this.

(*s*) *Martens, Nouv. Rec., Supplément*, t. ii. p. 81.

*Felix*, p. 621, p. 594.

CCCLXXVII. The Extradition of persons accused of high treason was stipulated for in Treaties made by *Russia* with Prussia as to Polish subjects (January 1834); with all the States of the Germanic Confederation (August 1836); and with the Two Sicilies (*t*).

CCCLXXVIII. For the Extradition of *deserters*, *Austria* had Treaties with Russia (April 1808, May 1815, July 1822) (*u*); with the minor Italian States; with the Pope (June 1821); with Sardinia (February 1826); and with the Germanic Confederation (February 1831, May 1832).

CCCLXXIX. *Prussia* punished offences committed by her subjects in foreign lands against her *own* laws only (*x*); but incorporated in her criminal code the obligation of the proper magistrate to enforce the Extradition which has been the subject of Treaties with other nations; certain precautions being taken, such as taking security for obtaining a return for the Act of Comity granted by her (*reversalia de observando reciproco*) (*y*). She has had various Treaties since 1811.

In 1832, 1834, and 1836, Prussia entered into Treaties for the surrender of *political offenders* with the Germanic Confederation, Austria, and Russia (*z*); in 1833 and 1837 (*a*), into Treaties with the Germanic Confederation for the surrender of *contrabandists*, provided that they were not subjects of the State in which they were arrested.

She also stipulated for the Extradition of *deserters* with Denmark, Brazil, France, Luxemburg, and the Germanic Confederation (*b*).

*Bavaria*, *Oldenburg*, *Saxe-Altenburg*, *Brunswick*, *Hanover*, and *Electoral Hesse*, had the same principles, generally

(*t*) *Felix*, s. 621, p. 504.

(*u*) *Martens, Nouv. Recueil*, t. iv. p. 282; t. vi. p. 120.

*Felix*, s. 621, p. 505.

(*x*) *Ib.* s. 560, p. 547.

(*y*) *Ib.* s. 622, p. 505.

(*z*) *Ib.* t. xv. p. 44.

(*a*) *Ib.* s. 622, p. 506.

(*b*) *Ib.* s. 622, pp. 506, 507.

speaking, inserted in their domestic Codes and foreign Treaties.

The new German *Strafgesetzbuch* punishes offences by Germans in foreign countries against German laws, with certain restrictions and qualifications (sections 4, 5, 6 and 7). It provides that no German shall be given up to a foreign State for prosecution or punishment (section 9).

CCCLXXX. *Switzerland* has concluded various Treaties (c) for the Extradition of persons accused of crimes or misdemeanors; but in none of them is any mention made of the surrender of Swiss citizens; and it is expressly refused in the third Article of her Treaty with Austria, and in her Treaty with England.

*Spain and Portugal* (d) recognize the Extradition of persons charged with crimes or misdemeanors as a principle of International Law, and have various Treaties on the subject (e).

CCCLXXXI. *Denmark* entered into Treaties for the Extradition of malefactors with *Brunswick* (May 1732, July 1744, February 1759, and November 1767) (f); and with *Sweden* (December 1809) (g), in the Ninth and separate Article of which it was stipulated:—"Les devoirs du bon  
"voisinage imposant aux hautes parties contractantes l'obli-  
"gation réciproquement salulaire de contribuer, en autant  
"qu'il est en leur pouvoir, au maintien des loix criminelles  
"des deux pays, elles sont convenues d'un article séparé  
"qui sera à regarder comme s'il étoit inséré mot à mot dans  
"le présent traité, et par lequel l'extradition réciproque des  
"malfaiteurs et déserteurs sera stipulée et réglée" (h).

CCCLXXXIV. The *Sublime Porte* is accustomed to

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(c) *Vide post.*

(d) *Martens, Nouv. Rec. t. vii. p. 646; t. ix. p. 22.*

*Felix, p. 605, and note.*

(e) *Vide post.*

(f) *M. Kluit, passim.*

*Felix, s. 635, p. 606.*

(g) *Martens, Nouv. Rec. t. i. p. 223.*

(h) Sections ccclxxxii. and ccclxxxiii. of the last edition are omitted in this edition.

surrender malefactors who are *not* subjects, but has refused to surrender *political* criminals (*i*). She appears to have no Treaty on the subject of Extradition.

CCCLXXXV. *Greece* allows, by her domestic law, the Extradition of Turkish subjects for crimes or misdemeanors committed in her territory, but does not allow Greek subjects to be surrendered to Turkish authority for offences committed in the Turkish dominions (*j*).

CCCLXXXVA. The following is a chronological list of the most important Extradition Treaties believed to be now in force, which have been entered into by the Foreign Powers of Europe with countries other than England (*k*).

*Extradition Treaties.*

1843, Nov. 9,	between	France	and	United States
1844, Nov. 7,	"	France	"	Netherlands
1845, Feb. 24,	"	France	"	United States
" June 21,	"	France	"	Germany
" Aug. 20,	"	France	"	Germany
1850, April 9,	"	France	"	Columbia
" Aug. 26,	"	France	"	Spain
" Nov. 17	"	Germany	"	Netherlands
" Nov. 25,	"	Switzerland	"	United States
1851, Nov. 28,	"	Denmark	"	Netherlands
1852, June 16,	"	Germany	"	United States
" Aug. 28,	"	Austria	"	Netherlands
1853, July 16,	"	Austria	"	Belgium
" {Sept, 25,	}	Germany	"	Netherlands
" {Oct, 16,				
" Dec. 21,	"	Netherlands	"	Switzerland
1854, March 1,	"	Netherlands	"	Sweden and Norway
" March 6,	"	Austria	"	Germany
" June 22,	"	Netherlands	"	Portugal
" June 26,	"	Belgium	"	Portugal
" July 13,	"	France	"	Portugal
1855, July 17,	"	Austria	"	Switzerland
" Nov. 13,	"	Austria	"	France

(i) *Felix*, s. 639, p. 607, and note. See *Hertslet's State Papers*, vol. xxxviii. p. 1266; vol. xl. p. 121.

(j) *Ib.*, s. 640, p. 607.

*Revue étrangère*, t. i. p. 417.

(k) In *Hertslet's State Papers* (vols. xlv. to lxiii.) these Treaties up to 1873, with many others, will be found.

*Extradition Treaties (continued).*

1856, July 3, between	Austria	and	United States
1857, Sept. 6, "	Italy	"	Spain
" March 18, "	Austria	"	Belgium
1858, Feb. 10, "	France	"	United States
1859, { March 16	France	"	Spain
April 12, "			
" June 16, "	Spain	"	Monaco
1860, Jan. 5, "	Germany	"	Spain
" March 21, "	Sweden	"	United States
" April 11, "	France	"	Chili
1860, Aug. 2, "	France	"	Netherlands
" Aug. 3, "	France	"	Netherlands
" Nov. 5, "	Netherlands	"	Spain
1861, April 17, "	Austria	"	Spain
1863, Dec. 17, "	Portugal	"	Sweden and Norway
1866, Sept. 20, "	Italy	"	Sweden and Norway
" Oct. 2, "	Denmark	"	Russia
1867, March 31, "	France	"	Spain
" April 19, "	Netherlands	"	Russia
" June 20, "	Germany	"	Netherlands
" June 25, "	Portugal	"	Spain
1868, Feb. 22, "	Germany	"	United States
" March 23, "	Italy	"	United States
" May 27, "	Portugal		Spain
" June 2, "	Austria		Sweden and Norway
" June 3, "	Italy		Spain
" July 22, "	Italy		Switzerland
1869, Feb. 12, "	Austria		France
" Feb. 27, "	Austria		Italy
" April 15, "	Belgium		Italy
" June 4, "	France		Sweden and Norway
" July 9, "	France		Switzerland
" Nov. 20, "	Netherlands		Italy
1870, April 26, "	Belgium		Sweden and Norway
" May 12, "	France		Italy
" June 17, "	Belgium		Spain
" June 23, "	Belgium		Italy
1871, Oct. 31, "	Germany		Italy
" Dec. 11, "	France		Germany
1872, March 16, "	Spain		Brazil
" Sept. 4, "	Belgium		Russia
" Sept. 23, "	Austria		Montenegro
" Dec. 13, "	Austria		Belgium
" Dec. 30, "	France		Portugal
1873, Jan. 25, "	Germany		Switzerland
" Feb. 7, "	Portugal		Spain



*dition Treaties (continued).*

1873,	July 1,	between Italy	and	Switzerland
"	July 16,	" France	"	Italy
"	July 19,	" Denmark	"	Italy
"	July 25,	" Germany	"	Italy
"	Oct. 30,	" Portugal	"	Switzerland
"	Nov. 17,	" Russia	"	Switzerland
1874,	Jan. 24,	" Germany	"	Switzerland
"	May 13,	" Belgium	"	Switzerland
"	July 6,	" Germany	"	Switzerland
"	Aug. 15,	" Belgium	"	France
"	Sept. 30,	" France	"	Peru
"	Oct. 15,	" Austria	"	Russia
"	Nov. 14,	" Netherlands	"	Orange Free Stat
"	Dec. 24,	" Belgium	"	Germany
1875,	Sept. 12,	" France	"	Luxemburg
1876,	Jan. 28,	" Belgium	"	Spain
"	Feb. 10,	" Switzerland	"	Luxemburg
"	March 9,	" Germany	"	Luxemburg
"	March 25,	" Belgium	"	Denmark
"	May 13,	" Italy	"	Russia
"	July 8,	" France	"	Monaco
"	Aug. 10,	" Netherlands	"	Monaco
1877,	Jan. 5,	" Spain	"	United States
"	Jan. 16,	" Belgium	"	Netherlands
"	March 21,	" Russia	"	Spain
"	March 28,	" Denmark	"	France
"	June 21,	" Netherlands	"	Luxemburg
"	July 28,	" Denmark	"	Netherlands
"	Dec. 14,	" France	"	Spain
"	Nov. 17,	" Italy	"	Greece
1878,	May 2,	" Germany	"	Spain
"	March 18,	" Italy	"	Portugal
"	April 11,	" Netherlands	"	Portugal
"	Sept. 27,	" Portugal	"	Uruguay

CCCLXXXVb. The United States of America have made the following Extradition Treaties in addition to those mentioned above:—

Hawaiian Islands (December 20, 1849); Venezuela (August 27, 1860); Mexico (December 11, 1861); Hayti (November 3, 1864); Dominican Republic (February 8, 1867); Nicaragua (June 25, 1870.) (1).

The reciprocal Extradition of criminals amongst the States which constitute the Union is expressly provided for by the Constitution (*m*).

CCCLXXXVI. *England* holds, and has always held, as a general principle, the doctrine of refusing to surrender any persons who may have taken refuge in her dominions (*n*). The recent deviations from this principle are bounded by the letter of the Treaty which constitutes the particular case of exception; and by no Treaty has she departed from her rule of refusing the Extradition of political refugees (*o*).

By the Treaty of Amiens, *England*, for the first time, covenanted with *France* for the Extradition of fugitives charged with forgery, fraudulent bankruptcy, or murder, committed in their respective territories (*p*); but this Treaty was for a limited period. She also had at various times between 1787 and 1800 Treaties for the surrender of deserters in the German Principalities (*q*).

CCCLXXXVII. At the present time (August, 1879) the following Extradition Treaties are in force between *England* and foreign powers:—

*Austria* (December 3, 1873) (*r*); *Belgium* (May 20, 1876, and July 23, 1877); *Brazil* (November 13, 1872); *Denmark* (March 31, 1873); *France* (August 14, 1876); *Germany* (May 14, 1872); *Hayti* (December 7, 1874); *Italy* (February 5, 1873, and May 7, 1873); *Netherlands* (June 19, 1874); *Spain* (June 4, 1878); *Sweden and Norway* (June 26, 1873); *Switzerland* (March 31, 1874, June 19, 1878, and December 13, 1878); *United States of America* (August 9, 1842). This list does not include Treaties for the surrender of deserters from merchant vessels (*s*).

(*m*) *Story on the Constitution*, ss. 1807–8–9.

(*n*) *Vide M. Falix*, s. 641, p. 007, and note.

(*o*) *Debate in the House of Lords, February 4, 1842. Speech of Lord Brougham.*

(*p*) *Martens, Recueil*, t. vii. p. 404 (*Art. xx.*)

(*q*) *Ibid.*, tt. ii.–vii.

(*r*) The dates are those of signature, not of ratification.

(*s*) See *post*, p. 647.

CCCLXXXVIB. The first Treaty entered into by this country subsequently to the Extradition Act of 1870, was one with Germany, which has since been adopted as a model by the English Foreign Office.

The other Treaties differ little, except in the list of Extradition crimes. The German Treaty was signed at London, May 14, 1872, and runs as follows (*t*):—

“ART. I.—The high contracting parties engage to deliver up to each other those persons who, being accused or convicted of a crime committed in the territory of the one party, shall be found within the territory of the other party, under the circumstances and conditions stated in the present Treaty.

“ART. II.—The crimes for which the Extradition is to be granted are the following:—

“1. Murder, or attempt to murder.

“2. Manslaughter.

“3. Counterfeiting or altering money, uttering or bringing into circulation counterfeit or altered money.

“4. Forgery or counterfeiting, or altering or uttering what is forged or counterfeited or altered; comprehending the crimes designated in the German Penal Code as counterfeiting or falsification of paper-money, bank notes, or other securities, forgery or falsification of other public or private documents, likewise the uttering or bringing into circulation, or wilfully using such counterfeited, forged, or falsified papers.

“5. Embezzlement or larceny.

“6. Obtaining money or goods by false pretences.

“7. Crimes by bankrupts against bankruptcy law; comprehending the crimes designated in the German Penal Code as bankruptcy liable to prosecution.

“8. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or public officer of any company, made criminal by any law for the time being in force.

“ 9. Rape.

“ 10. Abduction.

“ 11. Child-stealing.

“ 12. Burglary or housebreaking.

“ 13. Arson.

“ 14. Robbery with violence.

“ 15. Threats by letter, or otherwise, with intent to extort.

“ 16. Sinking or destroying a vessel at sea, or attempting

“ to do so.

“ 17. Assaults on board a ship on the high seas, with intent to destroy life, or to do grievous bodily harm.

“ 18. Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the master.

“ The Extradition is also to take place for participation in any of the aforesaid crimes, provided such participation be punishable by the laws of both the contracting parties.

“ ART. III.—No German shall be delivered up by any of the Governments of the Empire to the Government of the United Kingdom; and no subject of the United Kingdom shall be delivered up by the Government thereof to any German Government.

“ ART. IV.—The Extradition shall not take place if the person claimed on the part of the Government of the United Kingdom, or the person claimed on the part of any of the Governments of the German Empire, has already been tried and discharged or punished, or is still under trial, in one of the States of the German Empire, or in the United Kingdom, respectively, for the crime for which his extradition is demanded.

“ If the person claimed on the part of the Government of the United Kingdom, or if the person claimed on the part of any of the Governments of the German Empire, should be under examination for any other crime in one of the States of the German Empire, or in the United Kingdom, respectively, his Extradition shall be deferred until the conclusion of the trial, and the full execution of any punishment awarded to him.

“ART. V.—The Extradition shall not take place if, subsequently to the commission of the crime, or the institution of the penal prosecution, or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the State applied to.

“ART. VI.—A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

“ART. VII. A person surrendered can in no case be kept in prison, or be brought to trial in the State to which the surrender has been made, for any other crime or on account of any other matters than those for which the Extradition shall have taken place.

“This stipulation does not apply to crimes committed after the Extradition.

“ART. VIII. The requisition for Extradition shall be made through the diplomatic agents of the high contracting parties respectively.

“The requisition for the Extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority of the State requiring the Extradition, and by such evidence as, according to the laws of the place where the accused is found, would justify his arrest if the crime had been committed there.

“If the requisition relates to a person already convicted, it must be accompanied by the sentence of condemnation passed against the convicted person by the competent Court of the State that makes the requisition for Extradition.

“A requisition for Extradition cannot be founded on sentences passed in *contumaciam* (u).

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(u) The French Treaty of 1876 provides (Art. VII.) that persons convicted by judgment in default, or *arrêt de contumace*, shall be in the matter of Extradition considered as persons accused, and, as such, be surrendered.

“ART. IX.—If the requisition for Extradition be in accordance with the foregoing stipulations, the competent authorities of the State applied to shall proceed to the arrest of the fugitive.

“The prisoner is then to be brought before a competent Magistrate, who is to examine him and to conduct the preliminary investigation of the case, just as if the apprehension had taken place for a crime committed in the same country.

“ART. X.—The Extradition shall not take place before the expiration of fifteen days from the apprehension, and then only if the evidence be found sufficient, according to the laws of the State applied to, either to justify the commitment of the prisoner for trial, in case the crime had been committed in the territory of the said State, or to prove that the prisoner is the identical person convicted by the Courts of the State which makes the requisition.

“ART. XI.—In the examinations which they have to make in accordance with the foregoing stipulations, the authorities of the State applied to shall admit as entirely valid evidence the sworn depositions or statements of witnesses taken in the other State, or copies thereof, and likewise the warrants and sentences issued therein, provided such documents are signed or certified by a Judge, Magistrate, or officer of such State, and are authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of State.

“ART. XII.—If sufficient evidence for the Extradition be not produced within two months from the date of the apprehension of the fugitive, he shall be set at liberty.

“ART. XIII.—All articles seized which were in the possession of the person to be surrendered at the time of his apprehension shall, if the competent authority of the State applied to for the Extradition has ordered the delivery thereof, be given up when the Extradition takes place; and the said delivery shall extend not merely to

“ the stolen articles, but to everything that may serve as a  
“ proof of the crime.

“ ART. XIV.—The high contracting parties renounce  
“ any claim for the reimbursement of the expenses incurred  
“ by them in the arrest and maintenance of the person to be  
“ surrendered, and his conveyance till placed on board ship;  
“ they reciprocally agree to bear such expenses themselves.

“ ART. XV. The stipulations of the present Treaty shall  
“ be applicable to the Colonies and foreign possessions of  
“ her Britannic Majesty.

“ The requisition for the surrender of a fugitive criminal  
“ who has taken refuge in any of such Colonies or foreign  
“ possessions shall be made to the Governor or chief  
“ authority of such Colony or possession by the chief  
“ consular officer of the German Empire in such colony  
“ or possession.

“ Such requisitions may be disposed of, subject always,  
“ as nearly as may be, to the provisions of this Treaty, by  
“ the said Governor or chief authority, who, however, shall  
“ be at liberty either to grant the surrender, or to refer the  
“ matter to his Government.

“ Her Britannic Majesty shall, however, be at liberty  
“ to make special arrangements in the British Colonies  
“ and foreign possessions for the surrender of German  
“ criminals, who may take refuge within such Colonies and  
“ foreign possessions, on the basis, as nearly as may be, of  
“ the provisions of the present Treaty.

“ The requisition for the surrender of a fugitive criminal  
“ from any Colony or foreign possession of her Britannic  
“ Majesty shall be governed by the rules laid down in the  
“ preceding Articles of the present Treaty.

“ ART. XVI.—The present Treaty shall come into force  
“ ten days after its publication, in conformity with the forms  
“ prescribed by the laws of the high contracting parties.  
“ It may be terminated by either of the high contracting  
“ parties, but shall remain in force for six months after  
“ notice has been given for its termination.

“The Treaty shall be ratified, and the ratifications shall be exchanged at London in four weeks, or sooner if possible.

“In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereunto the seal of their arms.

“Done at London, the fourteenth day of May, in the year of our Lord One thousand eight hundred and seventy-two.

(L.S.) “GRANVILLE.  
(L.S.) “BERNSTORFF.”

By a Protocol of the same date the convention for the mutual surrender of fugitive criminals signed between her Majesty and the King of Prussia, on March 5, 1864, was cancelled.

CCCLXXXVII. (x). The Treaty made in 1842 between Great Britain and the United States, commonly called the Ashburton Treaty, provides, by the tenth Article, that the two countries should, upon mutual requisitions by them or their ministers, officers, or authorities respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek an asylum or should be found within the territories of the other: provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed, and that the respective judges and other magistrates of the two Governments should have power, jurisdiction, and authority, upon complaint made

(x) This was part of Section cclxxxv. in the last edition. Section cclxxxvii. of the last edition has been transposed, and now forms part of Sect. cclxxxviii.



under oath, to issue a warrant for the apprehension of the fugitive or person so charged, so that he might be brought before such judges or other magistrates respectively, to the end that the evidence of criminality might be heard and considered; and if on such hearing the evidence should be deemed sufficient to sustain the charge, it should be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive, and that the expense of such apprehension and delivery should be borne and defrayed by the party making the requisition and receiving the fugitive; and the eleventh Article provides that the said tenth Article shall continue in force until one or other of the high contracting parties shall signify its wish to terminate it, and no longer (y).

This Treaty was confirmed by an Act (6 & 7 Vict. c. 76) passed on August 22, 1843, and was further confirmed by the 8 & 9 Vict. c. 120, which facilitated its execution. These two Acts are repealed and superseded by the Extradition Acts of 1870 and 1873 (z).

CCCLXXXVIII. The only important decision given in England on the former statutes was that in "*The Queen v. Clinton*" (a), in which Mr. Baron Platt observed: "The object of the Act was to give effect to a Treaty for reciprocally rendering up persons 'being charged' with forgery, &c., 'committed' within the jurisdiction of either party, &c. Now, 'being charged,' in his opinion, clearly meant, 'being then charged;' but the word 'committed' might stand for 'which have theretofore been committed,' or 'which

(y) *Hertlet's Treaties*, vol. vi. pp. 862-3: "An Act of the British Parliament for giving effect to a Treaty between her Majesty and the United States of America, for the apprehension of certain offenders." 6 & 7 Vict. c. 76.

*Martens, Rec. de Tr. t. xxxiv. p. 507*

(z) *Vide post*, p. 544, *et seq.*

(a) *Law Times*, November 1, 1865.

*Egan's Law of Extradition*, 54, 55

“ were then committed,’ or ‘ which should be committed after  
“ the passing of the Act.’ Looking into the Treaty, for the  
“ purpose of giving effect to which this Act was passed, he  
“ found the terms were such person as ‘ having committed,’  
“ ‘ &c., and being fugitive from justice,’ &c. On this he would  
“ remark that it appeared to him very doubtful whether,  
“ under this Treaty, a merchant committing forgery of a  
“ bill of exchange in the United States with the intention  
“ of providing for it at maturity, and coming over here *animo*  
“ *revertendi*, and therefore not a fugitive from justice, could  
“ be taken and given up to the American Government.  
“ ‘ Being fugitive’ meant being so at the time when the law  
“ was to be put in force. If so, then it would appear that  
“ the word ‘ committed’ meant committed after the Treaty.  
“ According to the common course of reasoning and of  
“ justice, it must be considered that the Treaty was meant  
“ to attach only on those whose crimes as well as flight had  
“ taken place since the making of the Treaty. That must  
“ be the construction of the Treaty, and the construction of  
“ the Act of Parliament must correspond ; for he considered  
“ that they were bound to advert to the Treaty to discover  
“ the meaning and intention of the Act of Parliament ; and  
“ therefore he thought that the word ‘ committed’ could not  
“ be referred to transactions before the date of the Treaty.  
“ The word could have no other application. That was his  
“ opinion ; and he thought he was bound to act upon it,  
“ because it seemed to him that, in this country, laws to tax  
“ or restrain liberty must be clear ; and if this was defective  
“ in expressing the intention of the Legislature, it was for  
“ them to alter it. His opinion was founded on the Treaty ;  
“ and, taking that ground, he thought that the Act of Par-  
“ liament could only apply to those who had committed the  
“ crime after the passing of it (b). It seemed to him, there-  
“ fore, that he could only order that this man be discharged.  
“ The prisoner was then accordingly discharged.”

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(b) 1 Will. IV. c. 66, which applies to forging or uttering in England documents purporting to be made out of England.

CCCLXXXVIII. (c). A former Treaty on the same subject had been signed between the North American United States and Great Britain in 1794; and under the twenty-seventh Article of that Treaty, a citizen of the North American United States, who had committed murder within the jurisdiction of England, that is, upon board a British ship on the high seas, was delivered up to the British by the American authorities, although it was strongly contended that the article of the Treaty was contrary to the constitution of the United States; that the Treaty could only relate to foreigners; that, the crime having been committed on the high seas, the Courts of the United States had competent jurisdiction; and that a grand jury ought to make inquest, before a party was sent away for trial. All these objections were overruled, and the prisoner delivered up to the British Consul (d).

In 1853, the Ashburton Treaty was enforced in the case of Thomas Kaine, an Irish criminal claimed by the British Consul, at the port of New York, for the crime of an assault with an intent to commit murder within the British dominions; and a formal and careful decision upon the effect of the Treaty was delivered by the American Commissioner, who said that it was his duty to inquire whether the evidence of the guilt of the person charged would justify his commitment for trial, according to the laws in force in the State of New York, if charged with the crime there, and the requisitions of those laws would be fully complied with by the production of evidence from which the Magistrate or Commissioner might conclude that the offence had been committed, and that there was probable cause to believe that the prisoner had been guilty of it. In this case the criminal was surrendered under the provisions of the Treaty.

CCCLXXXIX. The English Statute Law on this sub-

(c) Part of Sections cclxxxvi. and cclxxxvii. in former edition.

(d) *Robbins's Case*, sentence by Judge Bee, *State Trials of the United States*, published at Philadelphia (1849), p. 393.

*United States v. Nash*, *Bee's (American) Admiralty Reports*, 286.

ject is now comprised in the two Extradition Acts of 1870 and 1873 (33 & 34 Vict. c. 52, and 36 & 37 Vict. c. 60) (e). The first of these Acts repeals the previous enactments on the subject, and gives power to the Queen, by Order in Council, to apply its provisions to arrangements for the surrender of criminals entered into with foreign States (f). It prohibits the surrender of fugitives for political crimes, or where it is proved that the requisition for surrender has been made with a view to punish the fugitive for an offence of a political character. It also prohibits a surrender unless provision is made that the criminal shall not, without first having an opportunity of returning to her Majesty's dominions, be detained or tried for any offence committed prior to the surrender, except the Extradition crime, in respect of which the surrender is made.

The fourth section directs that no Order in Council for applying the Act in the case of any foreign State shall be made unless the arrangement provides for its own determination at not more than a year's notice on either side, and is in conformity with the provisions of the Act, especially with the restrictions on surrender. These two last sections became the subject of a discussion between England and the United States, which will again be referred to.

This Act is not confined to the United Kingdom, but, when applied by Order in Council, it extends, unless otherwise provided by the Order, to every British possession. With regard to laws on the subject of Extradition now or hereafter passed by the Legislature of any such possession, a discretion in the application of the Act is reserved to her Majesty in Council (g).

Foreign States are enabled, by the twenty-fourth section, to obtain evidence in her Majesty's dominions in criminal matters (not being of a political nature) in like

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(e) These two Acts will be found in the Appendix.

(f) Compare s. 29 of 36 & 37 Vict. c. 88, as to treaties made for the prevention of the Slave Trade.

(g) Sections 17, 18.

manner as it may be obtained in civil matters under 19 & 20 Vict. c. 113. This provision is supplemented by s. 5 of the Extradition Act, 1873.

The twenty-seventh section, after repealing certain specified Acts, provides that "this Act (with the exception of anything contained in it which is inconsistent with the Treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign States with which these Treaties are made, in the same manner as if an Order in Council referring to such Treaties had been made in pursuance of this Act, and as if such Order had directed that every law and ordinance which is in force in any British possession with respect to such Treaties should have effect as part of this Act."

The list of Extradition crimes contained in the first Schedule "is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute, made before or after the passing of this Act."

CCCLXXXIXA. There were three Treaties referred to in the repealed Acts, one of which was the Ashburton Treaty of 1842, already mentioned (*h*), and still in force. The others were Treaties with France and Denmark, which have been superseded by more recent arrangements.

36 & 37 Vict. c. 60 is an amending Act. It brings offences committed before the passing of the Act of 1870 under the provisions of that Act. It makes accessories to a crime, either before or after the fact, liable to surrender as if they were principals; and it adds considerably to the Schedule of Extradition crimes. By the 27th section of 36 and 37 Vict. c. 88, this Schedule is made also to include offences against the Slave Trade Acts.

CCCLXXXIXB. With regard to deserters from mer-

(*h*) See *ante*, p. 540.

*The of Arrangements (in the shape of Treaties, Conventions, Agreements, Declarations, Notifications, and Orders in Council) at present (May, 1879) existing between Great Britain and Foreign Powers, for the mutual surrender of Merchant Seamen Deserters. (i)*

Country	Treaty, Convention, Protocol, or Agreement	Foreign Notification or Declaration	British Order in Council
Austria	T. 30 Apr. 1868. Art. IV.	N. 25 Aug. 1852	16 Oct. 1852
Belgium	P. 23 July 1862	D. 24 Jan. 1856	8 Feb. 1856
Brazil	O. 22 Apr. 1873. Art. III.	—	17 May 1876
Bremen	No Treaty.	D. 24 Sept. 1852	16 Oct. 1852
Chili	T. 4 Oct. 1854. Art. XIII.	—	28 July 1856
Colombia	T. 16 Feb. 1866. Art. XXI.	—	28 Dec. 1866
Denmark	No Treaty.	N. 22 Mar. 1853	13 June 1853
France	A. 23 June 1854	D. 4 July 1854.	3 July 1854
Germany (see Prussia)			
Greece	A. 7 Aug. 1875	—	12 Feb. 1876
Hamburg	No Treaty.	D. 15 Sept. 1852	16 Oct. 1852
Italy	T. 6 Aug. 1863. Art. XIX.	—	11 June 1863
Lübeck	No Treaty	D. 22 Sept. 1852	16 Oct. 1852
Madagascar	T. 27 June 1865. Art. XIII.	—	28 Dec. 1866
Mecklenburg-Schwerin	No Treaty.	N. 24 Mar. 1854	9 Mar. 1854
Morocco	T. 9 Dec. 1856. Art. XV.	—	6 May 1857
Netherlands	O. 6 Mar. 1856. Art. X.	N. 14 Feb. 1854	9 Mar. 1854
Nicaragua	T. 11 Feb. 1860. Art. XVI.	—	27 Aug. 1860
Oldenburg	No Treaty	D. 9 May 1853	13 June 1853
Peru	T. 10 Apr. 1850. Art. X.	D. 15 Oct. 1852	18 Aug. 1852
Portugal	T. 3 July 1842. Art. XVI.	—	Act of P. 12 & 13 Vict. c. 25. 1849
Prussia	No Treaty.	N. 13 Oct. 1852	16 Oct. 1852
Russia	T. 12 Jan. 1859. Art. XVII.	—	18 Aug. 1852
Salvador	T. 24 Oct. 1862. Art. XVII.	—	27 Aug. 1860
Sandwich Islands	T. 10 July 1851. Art. XI.	—	11 June 1863
Siam	T. 18 Apr. 1855. Art. III.	—	No Order in Council
Spain	No Treaty.	—	10 Nov. 1866
Sweden	No Treaty	D. 27 Dec. 1859	23 Jan. 1860
Tunis	C. 19 July 1876. Art. XXXII.	D. 4 Aug. 1852	18 Aug. 1852
Turkey	No Treaty.	N. 19 Apr. 1865	17 May 1876
			18 May 1865

(i) All these arrangements are to be found in *Hertzel's Treaties*. See Chronological Index in vol. xiii.

chant ships, see the "Foreign Deserters Act, 1852," (15 & 16 Vict. c. 26, given in the Appendix); and as to arrangements with Portugal in that behalf 12 & 13 Vict. c. 25, amended by 39 & 40 Vict. c. 20, s. 2. See also the Table on preceding page.

CCCLXXXIXc. The decided cases on the construction of the two Extradition Acts are not numerous.

The questions raised *in re* Elise Counhaye (*j*) turned partly upon ambiguities in the first Act, subsequently removed by the second; but it seems to have been decided that conditions precedent to initiating proceedings under the Act of 1870, required by a Treaty, but not required by the Act itself, cannot be taken into account in considering the validity of proceedings under the Act, provided that the magistrate in other respects had jurisdiction under the Act.

*Regina v. Wilson* (*k*) was a case arising upon the Treaty between England and Switzerland, which contained a proviso that no subject of either State should, under such Treaty, be delivered up by his own Government to the other State. An Order in Council had been made, reciting this Treaty, and directing that the Extradition Act of 1870 should apply to it. It was holden that as the Act empowered her Majesty to make the application of the Act subject to limitations and conditions, and as the Order must be co-extensive with and limited by the Treaty, it was not lawful under the Act to deliver up a British subject to Switzerland.

*Winslow's Case*.—In 1876 a question that produced much discussion in both countries arose between England and the United States of America (*l*).

(*j*) *Law Reports*, 8 Q. B. 410, May 1873.

(*k*) *Law Reports*, 3 Q. B. D. 42, November 1877. See also the case of *Re Terraz*, 4. Ex. D. p. 63, on the form of warrant necessary.

(*l*) *Hansard's Parl. Debates*, House of Lords, 1876, July 24, August 3; 1877, February 13.

. *Annual Register*, 1876, pp. 56, 318.

*Parliamentary Papers*, 1876; *North America*, Nos. 1 and 2.

Early in that year a man named Lawrence was delivered up by the British to the American Government, on a charge of forgery. Before the trial came on, the British Government received a communication from her Majesty's Minister at Washington, stating that Lawrence would probably be prosecuted for other offences, in addition to that for which he had been surrendered. On remonstrance being made, the American Government did not deny that they intended to take that step, and claimed the right to do so under the Treaty of 1842. This right was not admitted in England, and a considerable correspondence ensued. The Extradition of three other Americans—Winslow, Brent, and Gray—who had been arrested in this country, was refused, unless a pledge was given by the United States that they should not be tried for any offence except that in respect of which their surrender was demanded. This condition, which was unusual, seems to have been required with a view of conforming to the third and fourth sections of the Extradition Act, 1870; but in the course of the correspondence, the English Foreign Minister (*m*) treated that Act as a subordinate consideration, and asserted that it was an essential principle of Extradition, as permitted or practised by this country, that a person surrendered under an Extradition Treaty can be tried for no previous offence other than the one for which he is so surrendered. He also maintained that this was the meaning which the British Government had always themselves placed upon Article X. of the Treaty of 1842 and had hitherto considered to have been placed upon it by the Government of the United States.

The condition sought to be imposed was peremptorily rejected by the American Foreign Secretary, whose Government contended that they had never adopted or admitted the construction of the Treaty now put forward by England; that it was not forbidden by that Treaty, or by the

(*m*) *Despatch from Lord Derby to Colonel Hoffmann, June 30, 1876. Parl. Papers, ubi sup.*



laws of the United States, and that it had been the practice in both countries to try surrendered criminals for other offences; that the terms of a Treaty could not be modified by a purely domestic enactment of the British Parliament; and that in any case the Act of 1870, by its twenty-seventh section, was prevented from applying to the Treaty of 1842.

In consequence of this disagreement the operation of the Treaty was for a time suspended, and the three men in custody were set free. In the month of August, however, the Foreign Office received information from the United States Government, that so far as they were concerned, no steps had been taken, or had been intended to be taken, with the view of putting Lawrence on his trial for any other offence. As to their claim of right so to do, they adhered to it. This communication, in the opinion of Lord Derby, altered the question from a practical to a theoretical one, and the operation of the Treaty was revived. Winslow and Gray in the meantime had left the country; but Brent was re-arrested, and surrendered unconditionally to the authorities of the United States (n).

The position taken up by the Americans in the controversy received much support in this country, especially in the House of Lords.

Their contention as to the express meaning of Article X. of the Treaty of 1842, and as to the inability of the Act of 1870 to affect it, seems to be unanswerable. The question as to the tacit understanding and practice that prevailed with regard to Extradition is an issue rather of fact than of law.

CCCLXXXIXD. A Royal Commission on Extradition was appointed in 1877, and their Report was published in May 1878.

The opinion of the Commissioners was in favour of con-

(n) The question has been considered with much care and ability in a letter from the Hon. W. B. Lawrence.—*Albany Law Journal*, August 5, 1876.

siderably extending the practice of delivering up fugitive criminals. The Report commenced by laying down the proposition that the Extradition of fugitive criminals is founded on a twofold motive :—(1.) That it is the common interest of mankind that offences against person and property, offences which militate against the general well-being of society, should be repressed by punishment ; and (2) that it is to the interest of the State into whose territory the criminal has come that he shall not remain at large therein.

On those grounds it was argued that we might reasonably claim from all civilized nations to unite with us in a system for the common benefit of all ; but that nevertheless reciprocity is not a necessary element in the matter of Extradition. Extradition Treaties, it was advised, should no longer be held indispensable, but whilst retaining the power of the Crown to make such Treaties, statutory powers should be given to the proper authorities to deliver up fugitive criminals whose surrender is asked for, apart from the existence of any Treaty between this country and the State against whose laws the offence had been committed. Such statutory power was to be extended only to those foreign countries to which it should, from time to time, be declared by Order in Council to apply.

The Commissioners then proceed to make certain recommendations, of which the following are the most important :—

The stipulation, now usual in Extradition Treaties, that a criminal shall not be surrendered by the State of which he is a subject, should no longer be inserted.

The list of Extradition offences should include all those offences which it is the common interest of mankind to suppress ; that is to say, offences against person and property, including in the latter category cases of fraud, the purpose of which is to obtain property or money, offences against the Bankruptcy Laws, forgery, and offences relating to coinage.

Offences of a local or political nature should be excluded, but a political *motive* should not be allowed to

give immunity to a criminal for a crime which in itself and apart from such motive would be classed as an Extradition offence.

Offences punishable by the law only of particular nations, and not universally, should be excluded. This country should not surrender a person for any offence not indictable under our own criminal laws, which are sufficiently comprehensive.

No objection should be made if a criminal surrendered for one offence be tried for another, provided that it be an Extradition offence. This latter proviso should be stipulated for, either generally in a Treaty or in each particular case of surrender.

As a precaution against the risk of a person being tried for a political offence after having been delivered up for an Extradition offence, the accused, on alleging such risk, should be allowed an inquiry, and the Executive should have a discretion, dependent on the result of the inquiry, to refuse a surrender without specific pledges against such a contingency.

Means should be provided for the arrest and re-delivery into custody of any person who, whilst in process of being extradited by one foreign State to another, passes through British territory and there escapes.

The Commissioners conclude by suggesting that the legislation that would be necessary if their recommendations were adopted should be embodied in a statute complete in itself, without reference to previous enactments (o).

(o) The recommendation that a person surrendered for one extradition offence should thereupon become justiciable for another, was disapproved of by Mr. Torrens, one of the Commissioners; but in other respects the report was unanimous.

## PART THE FOURTH.

### CHAPTER I.

#### INTERVENTION.

CCCXC. IN all systems of Private Jurisprudence, provision is made for placing upon the abstract Right of Individual Property such restrictions as the general safety may require. The maxim "*expedit enim reipublicæ, ne quis sua re male utatur,*" belongs to the law of all countries (a).

The Prætorian *Interdict* (b) of the Roman, the *Injunction* of the English Law, give effect to this principle by *preventing* the mischief from being done, instead of endeavouring to remedy it when done.

CCCXCI. Some analogous right or power must exist in the system of International Jurisprudence. "Neither," says Lord Bacon, "is the opinion of some of the schoolmen "to be received, that a war cannot justly be made but upon

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(a) *Inst.* lib. i. viii. 22: "Chaque droit a ses limites: il est limité par les droits analogues de tous les membres d'une société."—*Ahrens, Cours de Droit naturel ou de Philosophie du Droit*, p. 296. (Brux. 1844.)

(b) Among the principal instances in which individual property is subjected to restriction on account of the general good are the following:—

*Cautio damni infecti*, *Dig.* xxxix. t. ii.

*Actio de tigno juncto*, *Dig.* xlvii. t. iii.

*Interdictum de glande legenda*, *Dig.* xliii. t. xxviii.

*Actio aquæ pluvie arcendæ*, *Dig.* xxxix. t. iii.

*Interdictum de arboribus cædendis*, *Dig.* xliii. t. xxvii.

“ a precedent injury or provocation ; for there is no question  
 “ but a just fear of an imminent danger, though there be no  
 “ blow given, is a lawful cause of a war ” (c). The Right  
 of Self-Defence incident to every State may in certain  
 circumstances carry with it the necessity of *intervening* in  
 the relations, and, to a certain extent, of controlling the  
 conduct of another State ; and this where the interest of the  
*intervener* is not immediately and directly, but mediately and  
 indirectly, affected. This remark brings us to the considera-  
 tion of the doctrine of INTERVENTION (d).

CCCXCII. And first of all it should be clearly under-  
 stood that the Intervention of bodies of men, armed or to  
 be armed, uncommissioned and unauthorised by the State to  
 which they belong, in a war, domestic or foreign, of another  
 State, has no warrant from International Law.

It has been already observed (e) that it is the duty of a  
 State to restrain its subjects from invading the territory of  
 another State ; and the question when such an act on the  
 part of subjects, though unauthorised by the State, may  
 bring penal consequences upon it, has received some con-  
 sideration.

It is a question to which the events of modern times have  
 given great importance, and as to which, during the last  
 half-century, the opinions of Statesmen, especially of this  
 country, have undergone a material change.

That this duty of restraining her subjects is incumbent  
 upon a State, and that her inability to execute it cannot be  
 alleged as a valid excuse or as a sufficient defence to the  
 invaded State, are propositions which, strenuously contested  
 as they were in 1818, will scarcely be controverted in 1879.

The means which each State has provided for the purpose

(c) *Essay on Empire.*

(d) *Günther*, i. 287, ss. 8-12.

*Heftler*, 90.

*Wheaton*, *Droit intern.* t. i. pp. 77, 92.

*Manning*, *Law of Nations*, p. 97.

(e) *Vide ante*, s. ccxix. on the question *Civitasne deliquerit an cives?*

of enabling herself to fulfil this obligation form an interesting part of Public and Constitutional Jurisprudence, to the province of which they, strictly speaking, belong. The question, however, borders closely upon the general province of International Law, and upon the particular theme of this chapter; and some notice of the private law of States, especially of England and the United States of America, with respect to this subject, seems proper in this place, though the fuller consideration of it belongs to a later part of this work, in which the duties and rights of Neutrals in time of War are discussed.

The United States of America began their career as an independent country under wise and great auspices, and it was the firm determination of those who guided their nascent energy to fulfil the obligations of International Law as recognized and established in the Christian commonwealth of which they had become a member.

They were sorely tried at the breaking out of the war of the first French Revolution, for they had been much indebted to France during their conflict with their mother country, and were much embarrassed by certain clauses relating to Privateers in their Treaty with France of 1778; but in 1793, under the Presidency of Washington, they put forth a proclamation of neutrality, and, resisting both the threats and the blandishments of their recent ally, took their stand upon sound principles of International Law, and passed their first Neutrality Statute of 1794. The same spirit induced the Government of these States at that important crisis, when the Spanish colonies in America threw off their allegiance to the mother country, to pass the amended Foreign Enlistment Statute of 1818; in accordance with which, during the next year, the British Statute, after a severe struggle and mainly by the great power of Mr. Canning, was carried through Parliament.

Public feeling, however, was generally averse to it, and a notion that it assisted the despotic Powers of Europe in repressing the efforts of their subjects to obtain constitutional

liberty prevailed. It is a very remarkable fact that no public prosecution of an offender against the provisions of the statute appears to have been formally conducted, by order of the Government, in a court of justice, until the period of the recent American civil war; that is, nearly fifty years after the passing of the Act. Public opinion upon the subject had then undergone a revolution. The statute when put to a practical test was found to be badly constructed, and to bear in its loose phraseology and disjointed sentences (*f*) marks of the compromise which had enabled it to become law (*g*).

In substance, though not without variations judicially considered important, it agreed with the American Statute, which it was designed to follow. The machinery has been much improved by the Statute of 1870, which is calculated to strengthen the hands of the Executive (*h*).

It appeared from evidence laid before the English Neutrality Laws Commission, appointed by the Queen in 1867 (the recommendations of whose report are mainly incorporated in the present and recent Statute) that European States generally were furnished by their municipal law with the means of fulfilling their international obligations in this respect.

The question whether the powers originally given by the Statute 59 Geo. III. c. 69 (July 3, 1819), to our Government, and by that of the preceding but almost contemporaneous Statute of Congress (April 20, 1818), to the Government of the United States, are in excess or are in fulfilment of the International obligations of the neutral, receives a different solution from two schools of opinion as distinct upon this point as upon that of contraband. If the former school was correct in its opinion, then the English

(*f*) *Rep. of the Alexandra*, by Eyre and Spottiswoode, 1864, p. 551.

(*g*) *Regina v. Carlin, ship Salvador. Law Rep. 3 P. C. p. 218* (1870).

(*h*) "33 & 34 Vict. c. 90.—An Act to regulate the conduct of her Majesty's Subjects during the existence of hostilities between foreign States with which her Majesty is at peace." (August 9, 1870.)

Government was already more than sufficiently armed with authority for the discharge of the International duty incident to a neutral. If the latter school was correct in its opinion, then there was, to say the least, a doubt whether the Statute, as at present interpreted by English Judges, did confer on our Government the requisite authority (i).

In considering this subject it is to be remembered that International Law is not stationary, and that precedents of history, taken from a period when the mutual relations of States were less clearly defined than at present, cannot be considered as decisive on the point at issue. Precedents may be found in the time of Queen Elizabeth, and later, in which large bodies of English subjects were enlisted under the authority of the Government in this country, and, displaying the English or Scotch standard, took a part in the civil war of a foreign State without open war being declared between that foreign State and England. But for more than a century, at least, such a state of things has been considered as inconsistent with the duties of a neutral State (j).

And although the only alteration suggested by the United States has been in favour of a relaxation of the stringency of the provision of their Municipal Act, I rejoice that the English Government has, by the last Statute, strengthened the hands of the Executive and given greater force and prominence to the maxim, that with respect to the external relations of the State, the will of the subject is bound up in that of his Government.

At all events, those who are interested in the progress of International justice may look with satisfaction upon the general state of feeling and usage throughout the civilized world upon the much-vexed question of Foreign Enlistment. There is no International subject perhaps in which, during

(i) See *Report of Neutrality Laws Commission*, 1868.

(j) At the time of the Crimean War the British Government took into their pay large bodies of mercenaries, designated Foreign Legions, and composed chiefly of natives of Germany and Switzerland, countries then at peace with Russia. See *Hansard, Parl. Deb.* vol. cxlii. p. 1152.



the last thirty years, so decided an improvement has taken place. The axiom that to enlist foreign subjects without the consent of their Governments is a grave breach of the Right of States, is now, it may be reasonably hoped, firmly incorporated into the code of International Law.

CCCXCIIA. The following cases recently decided in the English Courts are worthy of attention:—

In the *International (k)*, an English company had contracted with the French Government, during the Franco-German war, to lay down submarine telegraph cables between certain places on the French coast, and had fitted out a ship for that purpose, which was detained by order of the Secretary for Foreign Affairs as about to be despatched contrary to the Foreign Enlistment Act, 1870. It was shown that the projected cables could be united by land telegraphs into a continuous series, and would probably be partially used for military purposes; but the Court held that the primary and paramount character of the undertaking was a commercial one, and that the company therefore were entitled to have the ship released. Had it been proved that the main object of laying the cables was to assist military operations, the decision would have been different.

In the case of *The Gauntlet (l)* an English tug had, during the same war, been engaged by the French Consul, at Dover, to tow, and had towed, a Prussian war ship, taken as a prize by a French war ship, to Dunkirk Roads. The Judicial Committee of the Privy Council, overruling the Admiralty Court, decided that such engagement by the owners of the tug was despatching a ship, within the meaning of Section 8 of the Act, for the purpose of taking part in the naval service of a belligerent, and condemned the tug as a forfeiture to the Crown.

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(k) *Law Rep. 3 Adm. and Ecc.* p. 321 (1871).

(l) *Law Rep. 3 Adm. and Ecc.* p. 381, 4 P. C. 184 (1872).

The American Statute has not as yet been altered (*m*).

CCCXCII.B. The question of contraband merchandise sent to the market of a belligerent, and subject to capture on its road, does not properly belong to this chapter, but to another part of these Commentaries (*n*), where it is considered.

CCCXCIII. Having made these observations with respect to the INTERVENTION of subjects unauthorized by the State to which they belong, we must now consider *Intervention* properly so called; that is, by the State herself.

The reason of the thing and the practice of nations appear to have sanctioned this Intervention in the following cases:—

- I. Sometimes, but rarely, in the domestic concerns and internal rights of Self-Government, incident, as we have seen, to every State.
- II. More frequently, and upon far surer grounds, with respect to the territorial acquisitions or foreign relations of other States, when such acquisitions or relations threaten the peace and safety of other States.

(*m*) See a very elaborate note, by Mr. Dana, on the Statute with reference to the legislative, executive, and judicial proceedings upon it, in his edition of *Wheaton*, p. 536 (430). In 1866 a new Neutrality Bill was presented to the House of Representatives by the Committee of Foreign Affairs. It was the fruit of the existing irritation about the *Alabama*. It never became law. It “proposed to modify the American neutrality laws so as to make them more in conformity with the British Foreign Enlistment Act (59 Geo. III. c. 69), but with one notable difference. That Act prohibits the arming or equipment of any ship within the United Kingdom, with intent that it shall be employed in the service of any foreign State or with intent to commit hostilities against any State with whom her Majesty shall not then be at war; but, by way of retort for the alleged delinquencies of the British Government in the case of the *Alabama*, the Neutrality Bill provided that ‘the neutrality laws shall not be so construed as to prohibit the sale of vessels, ships, or steamers, or materials and munitions of war, the growth or product of this country, to the Government or citizens of any country not at war with the United States.’ So that the framers of this measure proposed to legalize the very thing from which, owing to a clandestine evasion of the Act, America had herself suffered, and of which she so loudly complained against Great Britain.”—*Ann. Reg.* 1866, p. 277.

(*n*) See vol. iii. pt. x. ch. i.

In the former case the just grounds of Intervention are—

1. Self-Defence, when the Domestic Institutions of a State are inconsistent with the peace and safety of other States.
2. The Rights and Duties of a guarantee.
3. The Invitation of the Belligerent Parties in a civil war.
4. The Protection of Reversionary Right or Interest.

In the latter case the just grounds of Intervention are—

5. To preserve the Balance of Power; that is, to prevent the dangerous aggrandisement of any one State by external acquisitions.
6. To protect Persons, subjects of another State, from *persecution* on account of professing a Religion not recognized by that State, but identical with the Religion of the Intervening State.

These grounds, either separately or in conjunction, will be found in the following pages to have been deliberately and solemnly proclaimed as justifying causes of Foreign Intervention.

CCCXCIV. The First Limitation of the general right, incident to every State, of adopting whatever form of government, whatever political and civil institutions, and whatever rules she may please, is this:

No State has a right to establish a form of government which is built upon professed principles of hostility to the government of other nations (*o*).

CCCXCV. It may be admitted that Venice in 1298, Great Britain in 1649, France in 1789, and after the accession of the Cavaignac Administration in 1848, and after the revolution in 1851, and after the defeat of Sedan in 1870, were entitled, upon the principles of National Independence, and without the Intervention of Foreign States, to make the great changes in their respective constitutions which were effected at those periods, because such changes concerned themselves alone.

CCCXCVI. Why, then, cannot the same remark be applied to the French Revolution in the year 1792? The answer is to be found in the Decree promulgated by the Convention on November 19, 1792.

The *Moniteur* of that day records it in these words: "*Lepeaux* propose et la *Convention* adopte la rédaction suivante :

"La Convention nationale déclare qu'elle accordera secours  
"à tous les peuples qui voudront recouvrer leur liberté, et  
"elle charge le pouvoir exécutif de donner des ordres aux  
"généraux des armées françaises pour secourir les citoyens  
"qui auraient été, ou qui seraient vexés, pour la cause de la  
"liberté.

"La Convention nationale ordonne aux généraux des  
"armées françaises de faire imprimer et afficher le présent  
"décret dans tous les lieux où ils porteront les armes de la  
"République.

"*Sergint*. Je demande que ce décret soit traduit et imprimé dans toutes les langues.—Cette proposition est adoptée."

This decree was treated by Great Britain (*p*), which, up to the period of its promulgation, had remained strictly neutral,

(*p*) "The decisive proof upon the subject was to be found, not in loose recollection or in vague reports, but in the Journals of the House.—The speeches with which the King had opened and concluded each session of Parliament afforded an authentic record of the language of Government respecting the origin, grounds, and progress of the war. There were, besides, upon the Journals, many declarations which this House had made at different periods, and sometimes at the express suggestion of Ministers themselves, and with the avowed intention of obviating misrepresentations.

"This, then, was his defence of Parliament against the imputation of having varied its language or disguised its objects—of having engaged in the war for the restoration of monarchy in France, or of having pursued it at any period with any other view than that of obtaining a secure and honourable peace for his country."—*Speech of Lord Grenville in the House of Peers, on the motion of the Duke of Bedford for the dismissal of Ministers, March 22, 1798.* Pub. by J. Wright, 169 Piccadilly. See also *M. Lamfrey's Hist. de Napoléon I.* t. ii. pp. 63-4-5.

as a declaration of war, of the worst and most hateful kind, against all nations; nor indeed is it possible to conceive a grosser violation of the particular principle of International Law (*q*) which we are discussing, than is to be found in this barbarous and unprecedented proclamation—the herald of that long, bloody, terrible, and universal war, which shook not only Europe, but the world, to its centre, and of which the wounds are not yet healed.

CCCXCVII. It is impossible to deny that the proclamation put forward by the De Lamartine Administration, after the expulsion of Louis-Philippe, partook of the same character, though in a mitigated degree.

According to that proclamation, “*Les traités de 1815 n'existent plus en droit aux yeux de la République française: toutefois les circonscriptions territoriales de ces traités sont un fait qu'elle admet comme base et comme point de départ dans les rapports avec les autres nations*” (*r*).

CCCXCVIII. In cases like the foregoing, the Right of Self-Defence justifies other nations in intervening and demanding, and if necessary by force of arms compelling, the abolition of a Government avowing a *principle* of hostility to the existing Governments of all other nations.

But this, like the other grounds of Intervention, is very liable to be abused. The most flagrant instances of such

(*q*) *Vattel* justifies by anticipation the conduct of Great Britain in declaring war after the promulgation of this decree. “*Donc toutes les nations sont en droit de réprimer par la force celle qui viole ouvertement les lois de la société que la nature a établies entre elles, ou qui attaque directement le bien et le salut de cette société.*”—*Prélim.* s. 22. “*Les nations ont le plus grand intérêt à faire universellement respecter le droit des gens, qui est la base de leur tranquillité. Si quelqu'un le foule ouvertement aux pieds, toutes peuvent et doivent s'élever contre lui; et réunissant leurs forces pour châtier cet ennemi commun, elles s'acquitteront de leurs devoirs envers elles-mêmes et envers la société humaine, dont elles sont membres.*”—*L. i. c. 23, s. 283.*

(*r*) “*Manifeste aux Puissances, 4 mars.*”—*Trois Mo:s au Pouvoir de M. de Lamartine*, p. 75.

abuse are to be found in the Partitions of Poland (*s*). The detailed history of these public crimes is without the province of this work. But no treatise on International Law may pass over, wholly without comment, these grievous acts of national wickedness.

The first spoliation was effected in September 1772, by Catherine II. Empress of Russia, Marie-Thérèse, Empress of Austria, and Frederick II. King of Prussia.

In the manifesto of the two latter may be read the miserable pretexts under which this crime was sought to be veiled. Austria claimed territory alienated from her to Poland *several centuries ago*, her first date being 1324 A.D., because, among other reasons, by the *Canon Law* alienations of territory by a crowned head were as invalid as the acts of a minor. Prussia took up her history not earlier than 1107 A.D., and recited various subsequent losses of property by the Margraves of Brandenburg, which Poland had acquired at a time when the Margraves were too feeble to resist, but to which property it was alleged that the Margraves had never formally renounced their claim.

It is manifest that the original sin of the spoliation was greatly enhanced by these pretended reasons for it; every one of them aimed a deadly blow at some sound principle of that faith which ought to bind together the nations of the globe. Russia, by far the boldest, and if the expression

(*s*) *Mackintosh's Works*, vol. ii. p. 330; and *Edinburgh Review*, vol. xxxvi. p. 463.

*Ferrand, Histoire des Trois Démembrements de la Pologne.*

*Rulhière, Histoire de l'Anarchie de Pologne.*

*Flassan, Histoire de la Diplomatie française*, t. vi.

*Dohm, Denkwürdigkeiten meiner Zeit.*

*Von Raumer, Polens Untergang: Histor. Taschenbuch*, t. iii.

*Koch, Histoire abrégée de Traités de Paix, continuée par Schoell* (ed. Bruxelles), t. iv. pp. 266-284, c. 60, *ib.* pp. 296, 304, 307-13, c. 62.

*Koch, Tableau des Révolutions de l'Europe*, t. ii. pp. 168, 224, 284.

*Gentz, Fragmente aus der neuesten Geschichte des politischen Gleichgewichts in Europa. Schriften*, Band iv. ss. 51-59.

*Wheaton's Hist.* pp. 267-281.

*Allye. Gesch.* B. xxiii. K. 11.

were allowable, the most honest criminal, seized upon her prey at once, scorning all subterfuges, and making openly her might her right.

These three spoliators, however, were not the only offenders against International Law. France and England beheld with silence and indifference this violation of all the safeguards of national liberty and independence: they cannot be acquitted of all blame; they contracted, in some degree at least, the guilt of the bystander who tamely and silently suffers a deed of wrong to be perpetrated in his presence.

In 1790, Poland, availing herself of the occupation afforded by a Turkish war to Catherine II. (who had never ceased to treat her as a province of Russia), contracted an alliance with Prussia, whereby that Power undertook to aid Poland against the attempt of any foreign nation to interfere with her internal government or affairs (*t*).

Under cover of this alliance, in 1791 Poland gave herself a new constitution, rendering her crown hereditary in the Electoral House of Saxony, abolishing that source of her misery the *liberum veto*, and effecting a reformation, of which Mr. Burke said: "So far as it has gone, it probably is the "most pure and defecated public good which ever has been "conferred on mankind" (*u*).

But the French Revolution broke out, and Prussia not only forgot her pledge, but joined with Russia and Austria in plundering, for the second time, the country which had relied upon her honour. The second spoliation of Poland took place in 1793; the third, after the insurrection of the illustrious Kosciusko in 1795.

The fate of Poland was again discussed at the Treaty of Vienna (1815); but after some remonstrance on the part of the British and French plenipotentiaries (*x*), and the delivery

(*t*) Martens, *Rec. de Traités*, t. iv. p. 472.

(*u*) *Appeal from the New to the Old Whigs*.

(*x*) Klüber, *Acten des Wiener Congr.* Band ix. 40-51.

Wheaton's *Hist.* pp. 425-435.

of a remarkable state paper by the latter, Russia retained that part of ancient Poland erected by Napoleon into the Duchy of Warsaw, and by this Treaty the Partition of Poland was ultimately confirmed.

This Treaty, however, declared Cracow to be a free, independent, and neutral city, under the protection of Russia, Austria, and Prussia, with so many square miles on the left bank of the Vistula, and a certain amount of population. This small remnant of their original prey has been subsequently devoured by the three protecting Powers. In 1832 the Emperor Nicholas annexed the kingdom of Poland to the Russian Empire, and destroyed every vestige of its separate nationality. In 1836 Cracow was occupied by Russian and Austrian forces, upon the allegation that it had become the centre of revolutionary plots. In 1846 (November 6), Cracow, in spite of the protests of Great Britain, France, and Sweden, was annexed to Austria.

Memorable lessons are written for the ensample of nations in the history of these great crimes and their consequences.

First, the folly and shortsightedness of vulgar politicians who hold the doctrine that a State has no concern with the acts of her neighbour, and that if wrong be done to others, and not to herself, she cannot afford to interfere.

Secondly, the certainty of that *Nemesis* which sooner or later overtakes the countries which have been, or have suffered their rulers to be, the doers of wrong.

It requires only a moderate acquaintance with history subsequent to those first spoliations of Poland, to know that the interference of England and France to prevent these atrocious acts, and to defend betimes the liberties of Europe, would have been no less wise, if regarded in an economical point of view, than just, if considered upon higher principles; and the Rulers of Austria, Prussia, and Russia must have been taught, during the wars of the French Revolution, and in the day of their bitter suffering and humiliation, the impolicy of injustice, and the danger of creating a precedent of rapine and wrong.



Great jurists of all countries have passed sentence upon the partitions of Poland. *M. de Talleyrand* (y) described it as the prelude, as partly the cause, and perhaps the excuse of the convulsions of Europe during the French Revolution. "The partition of Poland in 1772," says *M. Koch* (z), "appeared to sanction all subsequent usurpations." It was the most flagrant violation, according to *Mr. Wheaton* (a), of natural justice and International Law, since Europe had emerged from barbarism. No less a publicist than *Von Gentz* (b) observes that the partition of Poland was a crime fraught with peculiar mischief to the best interests of Europe—it showed to the astonished world a league of monarchs in favour of injustice;—those who ought to be the protectors, acting as the oppressors of national independence; while the doctrine of the Balance of Power, cited as a justification of their conduct by those who were destroying it, mournfully illustrated the adage, *Corruptio optimi pessima* (c).

And, lastly, I would cite the very recent authority of the Duc de Broglie (d): "Il y a une faute en particulier, à la fois politique et morale, qui pèsera toujours sur la mémoire de Louis XV et dont, si je ne me trompe, la découverte de la correspondance secrète doit altérer complètement sinon la gravité, au moins la nature. On devine que je veux parler du démembrement de la Pologne, ce brigandage diplomatique opéré sous les yeux de l'Europe indifférente, sans que le souverain de la France ait eu soit la perspicacité de pénétrer le complot qui l'avait préparé, soit, à la dernière heure, le courage d'en arrêter l'exécution. La France ne pardonnera jamais à ceux qui l'ont fait assister inattentive ou impuissante à la ruine

(y) *Note to the Congress of Vienna.*

(z) *Introd.* p. 30.

(a) *Hist.* p. 332.

(b) *Fragmente aus der neuesten Geschichte des politischen Gleichgewichts in Europa.* Schriften, B. iv. ss. 54-59.

(c) *Vide ante*, § lxxiii., for the subsequent international position of Poland.

(d) *Le Secret du Roi*, vol. i. pp. 4, 5.

“ d’une antique alliée et à l’un des plus criminels attentats  
 “ qui aient jamais outragé le droit de la nature et des gens.

“ On y voit à découvert et on y suit pas à pas ce qui ce  
 “ prince a médité de faire, et ce qu’il n’a pas fait pour  
 “ épargner à son règne une tache ineffaçable, à l’Europe une  
 “ source d’agitations qui n’est pas encore fermée et à la con-  
 “ science des peuples un scandale qui a ébranlé, par une  
 “ atteinte peut-être irréparable, les fondements du droit  
 “ public.”

CCCXCVIII. Greece during the Russian war (1856) afforded an instance in which this exceptional right of intervention, the offspring of necessity, has been exercised both by France and England, as it should seem upon two grounds :—(1) That the sending of foreign troops to Greece was necessitated by the unneutral conduct of the Government of that country towards Russia, the enemy of France and England ; (2) and also that this course was justified by the open, notorious, and admitted insecurity of life and property to French and English subjects commorant or resident in Greece. It should also be added, that Greece does not appear to have formally protested against, or seriously objected to—probably on account of the undeniable inefficiency of her own internal police—the temporary introduction of these foreign troops into her territory (*e*).

(*e*) “ It cannot be denied,” Count Walewski says, “ that Greece is in an abnormal state. The anarchy to which that country was a prey has compelled France and England to send troops to the Piræus at a time when their armies, nevertheless, did not want occupation. The Congress knows in what state Greece was ; neither is it ignorant that that in which it now is, is far from being satisfactory. Would it not therefore be advantageous that the Powers represented in the Congress should manifest the wish to see the three protecting Courts take into serious consideration the deplorable situation of the kingdom which they have created, and devise means to make provision for it ?

“ Count Walewski does not doubt that the Earl of Clarendon will join with him in declaring that the two Governments await with impatience the time when they shall be at liberty to terminate an occupation to which nevertheless they are unable without the most serious incon-

CCCXCIX. The Second Limitation arises in the instance of a *Guarantee* given by a Foreign Nation, either *generally* to secure the inviolability of the provisions of a particular Treaty, or *especially* to support a particular Constitution or form of government (*f*) established in another country, or to secure some particular possession or other individual object appertaining to it. The question of a *Federal Guarantee*, mutually given by united States has been already discussed: the very constitution of such a body politic implies the existence of a mutual guarantee for the independence of each member of it. This is the case of a guarantee from *within*, a question rather of Public than International Law, and very different from a guarantee from *without*, which rests upon a distinct principle, and is one of the most difficult and delicate questions which fall under the cognizance of International Law. The consideration of the duties and rights of *guarantees* belongs to that branch of the subject in which the nature of TREATIES is discussed.

CCCC. Another Limitation of the general principle under discussion may possibly arise from the necessity of Intervention by Foreign Powers in order *to stay the shedding of blood* caused by a protracted and desolating civil war in the bosom of another State (*g*). This ground of Intervention, urged on behalf of the general interests of humanity, has

venience to put an end, so long as real modifications shall not be introduced into the state of things in Greece."—*Extract from 22nd Protocol to Treaty of Paris (1856).*

(*f*) *Vide post.*

(*g*) "Sciendum quoque est, Reges, et qui par Regibus jus obtinent, jus habere pœnas poscendi non tantum ob injurias in se aut subditos suos commissas, sed et ob eas quæ ipsos peculiariter non tanguunt, sed in *quibusvis personis jus naturæ aut gentium immaniter violentibus*. Nam libertas humanæ societati per pœnas consulendi, quæ initio, ut diximus, penes singulos fuerat, civitatibus ac judiciis institutis penes summas potestates reedit; non proprie qua aliis imperant, sed qua nemini parent. Nam subjectio aliis id jus abstulit. Imo tanto honestius est alienas injurias quam suas vindicare, quanto in suis magis metuendum est ne quis doloris sui sensu aut modum excedat, aut certe animum inficiat."—*Grotius, de J. B. lib. ii. cap. xx. sec. xl.*

been frequently put forward, and especially in our own times, but rarely, if ever, without others of greater and more legitimate weight to support it; such, for instance, as the danger accruing to other States from the continuance of such a state of things, or the right to accede to an application from one of the contending parties.

As an accessory to others, this ground may be defensible; but as a substantive and solitary justification of Intervention in the affairs of another country, it can scarcely be admitted into the code of International Law, since it is manifestly open to abuses, tending to the violation and destruction of the vital principles of that system of jurisprudence,—such abuses as generated the several partitions of Poland, the great precedent so often quoted, and so often imitated by the violators of International Law. The necessity of staying the shedding of blood occupied a very prominent place among the various reasons alleged for the Intervention in the affairs of Turkey and her then Greek subjects in 1827; but it was by no means, as will be presently seen, the only justification advanced for that Intervention, though, perhaps, if it had been, the long continuance, as well as the horrible nature of the massacres committed, would alone, if ever such reasons could, have justified the interference of Christendom (*h*).

CCCCI. A Third Limitation arises when both contending parties in a civil war invite the Intervention of a third Power: in this case the right to accede to the request is perfectly clear. This was in fact the foundation of the Intervention in the case of Belgium. Whether, when the Intervention has been once undertaken, either or both of the contending parties can resile from their engagement, and whether the Intervener be obliged to desist *re infecta*, is a matter of some nicety, and must in some measure receive its decision according to the particular (*i*) circumstances of

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(*h*) *Papers relative to the Affairs of Greece*, p. 98.—London, 1835.  
(Printed by the Foreign Office.)

(*i*) France and England were the only two of the five Intervening Powers, in the case of Belgium, who seem to have entertained no scruples

each case (j). The Intervener might of course stipulate, before he undertook the Intervention, that both parties should abide by his decision. Although the right of intervening admits of no doubt where both parties invoke the Intervention, it is less clear when the application is made by one party alone, and yet it cannot be asserted, that even this kind of Intervention, so solicited, is necessarily at variance with any abstract principle of International Law, while it must be admitted to have received some sanction from the practice of nations. It should be observed that the recognition of the insurgent party in a civil war, either as a belligerent or as a separate State, does not constitute the recognizing State a belligerent.

The United States recognized, perhaps somewhat hastily in both senses, the insurgent American colonies of Spain, but were not at war with Spain. England and France, during the late American civil war, recognized the Southern Confederacy as belligerent; and, though in the heat and irritation of civil contest the Government of the United States resented even this qualified and necessary recognition, it was clearly a matter of simple justice and strict neutrality: a further recognition by sending an accredited Minister to a *de facto* State like the Southern Confederacy, with a regular Government and a large army, would not have afforded a justifying cause of war to the other belligerent.

France in 1770 not only recognized the American colonies when they revolted from England as a belligerent and a *de facto* State, but supplied them with money, arms, and soldiers, and entered into a secret alliance with them—an act of treacherous hostility to the mother country which no

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of this kind.—*Papers, &c. relative to Belgium.*—*Les Plénipotentiaires*, &c. p. 35; and in the case of Portugal, and in the case of Greece, *vide infra*, *Wheaton, Hist.* 541.

(j) *Heffter* maintains stoutly the obligation of withdrawing at the request of the party who invoked the aid (r 95 end of s 46).—*Martens*, t. i. 80-1-2.

American jurist would deny to have fully justified England in declaring war against her.

It will be remembered that at present we have no concern with the wisdom or policy of an Intervention invoked by one party alone: that is a National, not an International question. There is, however, one proposition with respect to this kind of Intervention which cannot be too broadly or emphatically stated.

In order to justify such Intervention, the kingdom in which it is to take place must be really divided against itself; there must be therein two parties in the *bona fide* condition of waging actual war upon each other.

No mere temporary outbreak, no isolated resistance to authority, no successful skirmish, is sufficient for this purpose; there should be "such a contest as exhibits some equality of force, and of which, if the combatants were left to themselves, the issue would be, in some degree, doubtful" (k).

In most cases, therefore, some time must elapse before an internal commotion can be clothed with the character of a revolution, and before the rebellious subjects can become the allies of a Foreign State.

The interference of Great Britain, France, and Russia in the affairs of Greece was vindicated upon three grounds: viz. 1st, of complying with the request of one party; 2ndly, of staying the shedding of blood; 3rdly, and principally, of affording protection to the subjects of other Powers who navigated the Levant, in which, for many years, atrocious Piracy had been exercised, while neither Turkey nor revolted Greece were *de facto* either able or willing to prevent the excesses springing out of this state of anarchy. The third ground unquestionably justifies such an interference as might redress the evil complained of, and secure the subjects of third Powers against a repetition of it. But the interference

(k) Sir J. Mackintosh's *Speech on the Recognition of the Spanish American States*, vol. iii. p. 462, of his *Works*.

took place at the request of only one of the contending parties, and that the party of revolted subjects; and it is edifying to observe with what scrupulous care the British Minister for Foreign Affairs, of that time, justifies, as an exception to general rules, the adoption of coercive measures against Turkey.

“To accomplish a great good,” says this admirable State Paper (*l*), “to put an end to a great evil, pressing seriously upon the interests of his Majesty’s own subjects, after several previous attempts by advice and remonstrance, separate or combined, had failed, and at the solicitation of one of the contending parties, his Majesty acceded to a more direct and concerted interference in the affairs of Greece. The Treaty of London was signed; and when proposals, made under it to both sides, and accepted by the Greeks, had been rejected by the Turks, his Majesty proceeded, along with his Allies, to adopt measures of a coercive nature, calculated to give effect to those proposals. But, in this departure from the general rule which forbids other Powers to interfere in contests betwixt Sovereign and Subject, his Majesty strictly limited himself to what he deemed the necessity of the case; and in pursuing an object of policy, endeavoured to adhere, as much as possible, to the principles of National Law.

“The design of the Treaty was the pacification of the Levant; but it is evident, both from the provisions of that Treaty, and from the language of the Protocol which preceded it, as well as from the tone of every communication relating to the Greek question, which has been made by his Majesty’s commands since the Congress of Verona, that it was equally our design to accomplish this end by pacific means. It was but late, slowly and unwillingly, that we entertained the idea of any species of coercion; and then only with such caution, and with such a reservation of our right to look narrowly at each successive stage

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(*l*) *State Papers—Greece*, 1826-1832, pp. 54, 55. London, 1835.

“ in that career, as were in themselves sufficiently indicative  
“ of the spirit in which we interposed. The conduct of the  
“ Allies is inexplicable upon any other ground than that  
“ which is here stated to have been its foundation. If the  
“ intention of three of the greatest Powers in Europe, to put  
“ an end to a manifest grievance, had not been controlled  
“ and modified by many weighty considerations of justice  
“ and policy, they would have pursued a far different course.  
“ They would not have waited six years before they carried  
“ their interposition beyond the limit of amicable remon-  
“ strance; nor, having at length satisfied themselves that  
“ they must advance somewhat further for the execution of  
“ their design, would they have stipulated beforehand to  
“ pause upon every successive step, in order to give time for  
“ reflection and concession on the part of a Power whom  
“ they did not design to crush, or even to humble, but, if  
“ possible, to lead into the path of safety and repose.

“ If they had not been restrained by such considerations,  
“ they would at once have put forth a strength irresistible  
“ by far greater empires; they would have substituted  
“ dictation, backed by force, for advice and remonstrance;  
“ and they would not have asked the consent of those to  
“ whom it was in their power to give law. But they felt,  
“ as we still feel, that this was a case surrounded with diffi-  
“ culties, of which the mere physical resistance of the contu-  
“ macious party was the least. They knew that hasty and  
“ violent measures might draw along with them evils worse  
“ than those which they meant to remedy. They knew too  
“ that the long continuance of extraordinary evils might  
“ justify an extraordinary interposition. Still they felt that  
“ they were bound to take care that the interposition should  
“ not be more than commensurate with the evil; that it was  
“ neither politic nor just to risk the overthrow of an empire  
“ for the chance of improving the condition of a part of its  
“ subjects; and that the cessation of Piracy in the Levant  
“ would be dearly purchased by a general war in Europe.”  
The pacification of Greece and the Levant was the object



of the Treaty of 1827, contracted between Russia, England, and France; the object of it was not "to construct a State capable of balancing the Turkish power in Europe, and of carrying on the relations of peace and war upon a footing of equality with the Porte;" this object, nevertheless, might, after the rejection by Turkey of the compromise proposed in that Treaty, have been partly intended and effected by the subsequent Treaty of May 7, 1832 (*m*). The distinction between Intervention and Mediation is pointed out in the happiest manner by Mr. Canning, in a passage of his state paper upon the Pacification of Greece at the close of the year 1824. "If" (he wrote) "the sovereignty of the Turks were not to be absolutely restored, nor the independence of the Greek to be absolutely acknowledged (*to propose either of which extremes would have been not to mediate, but to take a decided part in the contest*), there was necessarily no other choice than to qualify in some mode and degree the sovereignty of the one and the independence of the other, and the mode and degree of that qualification seemed to constitute the question for inquiry and deliberation" (*n*).

CCCCII. This observation brings us to the consideration of the Fourth Limitation of the general principle which founds the Right of Intervention,—which is, the right of third Powers to watch over the preservation of the Balance of Power among existing States, whether by preventing the aggressions and conquests of any one Power, or by taking care that, out of the new order of things produced by internal revolutions, no existing Power acquires an aggrandisement that may menace the liberties of the rest of the world (*o*).

(*m*) *Papers*, p. 155.

(*n*) *Reply of Mr. Secretary Canning to a letter of M. Rados, relative to the "Russian Memoir on the Pacification of Greece."*—Vol. xii. of *State Papers* (1824–25), p. 900.

(*o*) *Günther*, i. 345.

*Martens*, s. 121, a, b.

This right, indeed, is the right of the State to do that which Cicero (*p*), with so much eloquent reason, truly maintained was the innate right of every individual: it is the Right of Self-Defence, which is as lawfully exercised in preventing as in repelling attack (*q*).

How anxiously this right, “founded so much on common “sense and obvious reasoning,” was asserted and cherished by the Greeks, is well known to all readers of Thucydides and Xenophon, and above all of Demosthenes, whose eloquence was never more “resistless” (*r*) than when exerted

*Ancillon über den Geist der Staatsverf.* 320 u. s. w.

*Klinkhamer's Disp. Hist. Pol. de Bello propter Success. Regni Hispan.,* &c. (1829, *Amstelodami*), pp. 52–66.

*De Gardens, Traité complet de Dipl.* t. i. p. 257.

*Foreign Quarterly Review*, vol. viii. (1831), vol. xiii. (1834).

*Mackintosh's second Review of Burke's Letter on a Regicide Peace.*

*Ortolan*, vol. ii., *Du Domaine international* (tit. iii., *De l'Équilibre politique*), contains, among other passages worthy of attentive perusal, an elaborate review of the projects of Henry IV. and Sully to found a *République très-chrétienne*, and thereby maintain a perpetual European equilibrium—an idea which M. Ortolan thinks pervaded the minds of the framers of the Treaty of Westphalia.—*Gentz, Ausgewählte Schriften*, iv. i. *Fragmente aus der neuesten Geschichte des politischen Gleichgewichts.*

*Fénelon, Œuvres de*, t. iii. p. 361, ed. 1835: *Examen de la Conscience sur les Devoirs de la Royauté*, in which work, written for the instruction of the Duke of Burgundy, Mr. Wheaton remarks (*Hist.* p. 82) that the principles of Intervention to maintain the balance of power are laid down with accuracy and moderation.

*Mably*, vol. ii. pp. 88, 107, 212.

(*p*) *Pro Milone.*

(*q*) “Ainsi quand un Etat voisin est injustement attaqué par un ennemi puissant, qui menace de l'opprimer, il n'est pas douteux que vous ne deviez le faire. N'objectez point qu'il n'est pas permis à un souverain d'exposer la vie de ses soldats pour le salut d'un étranger, avec qui il n'aura contracté aucune alliance défensive, il peut lui-même se trouver dans le cas d'avoir besoin de secours; et, par conséquent, mettre en vigueur cet esprit d'assistance mutuelle, c'est travailler au salut de sa propre nation.”—*Vattel*, l. ii. c. 1–4.

(*r*)

“Whose resistless eloquence

Shook the arsenal, and fulmin'd over Greece  
To Macedon and Artaxerxes' throne.”

*Milton, Par. Reg.* iv. 268–271.

for the purpose of rousing his countrymen to adopt and act upon this principle (s).

In the history of Rome the opportunities for the development of this principle were fewer; but the pages of Livy and Polybius have recorded some remarkable instances of its operation. The reflection of the latter historian upon the conduct of Hiero, King of Syracuse, who, though an ally of Rome, sent aid to Carthage during the war of the Auxiliaries, may claim a place even in a modern work upon International Law. Hiero esteemed it necessary, Polybius tells us, "both  
" in order to retain his dominions in Sicily, and to preserve  
" the Roman friendship, that Carthage should be safe; lest  
" by its fall the remaining Power should be able, without let  
" or hindrance, to execute every purpose and undertaking.  
" And here he acted with great wisdom and prudence, for  
" that is never on any account to be overlooked; nor ought  
" such a force ever to be thrown into one hand, as to incapa-  
" citate the neighbouring States from defending their rights  
" against it."

Most justly does Mr. Hume remark upon this passage,  
" Here is the aim of modern politics pointed out in express  
" terms " (t).

It was the natural tendency of the Feudal System, introduced into Europe after the fall of Rome, to restrain each State within its boundaries (u); and it may be said, that from the reign of Charlemagne to the invasion of Italy by

(s) Among the passages, see κατὰ Φιλ. Γ. ιε: Τοὺς ἄλλους ἤδη παρακαλῶμεν, καὶ τοὺς ταῦτα διδάζοντας ἐκπέμπωμεν πρέσβεις παντοχοῖ, εἰς Πελοπόννησον, εἰς Ῥόδον, εἰς Χίον, ὡς βασιλέα λέγω—οὐ δὲ γὰρ τῶν ἐκείνῃ συμφερόντων ἀφέστηκε τὸ μὴ τοῦτον εἶσαι πάντα καταστρέψασθαι—ἴν' ἂν μὲν πείσητε, κοινωνοὺς ἔχητε καὶ τῶν κινδύνων καὶ τῶν ἀναλωμάτων, κ.τ.λ.

(t) Polybius, l. i. c. 83: Τότε δὲ καὶ μᾶλλον ἐφιλοτιμεῖτο πεπεισμένος συμφέρειν ἑαυτῷ καὶ πρὸς τὴν ἐν Σικελίᾳ δυναστείαν καὶ πρὸς τὴν Ῥωμαίων φιλίαν τὸ σώζεσθαι Καρχηδονίους, ἵνα μὴ παντάπασιν ἐξῇ τὸ προτεθὲν ἀκονεῖ συντελεῖσθαι τοῖς ἰσχύουσιν, πάντῃ φρονίμως καὶ βουλευχῶς λογιζόμενος, κ.τ.λ. Hume's Essays, vol. ii. p. 323, Essay vii. On the Balance of Power.

(u) See Koch, *Tableau des Révolutions*, t. i. pp. 314-15, &c.

Charles VIII. of France, towards the close of the fifteenth century, the state of the civilized world was not such as to call into any general operation this principle of International Law (x). To repel this invasion, the ingenious and refined Italians strove to induce the European Powers to adopt that policy of preventing the undue aggrandisement of any one Power, by which they had for some time maintained the equilibrium of the petty States of their own Peninsula. During the century which followed (y), and from the time that the liberties of the German Protestants were secured, under the guarantee of France and Sweden, by the Peace of Westphalia in 1648, this principle of International Law has been rooted in the usage and practice of the whole civilized world. The preservation of the Balance of Power has been the professed object of all, and the real end of most of what may be called the Cardinal Treaties. The recital and analysis of the events which led to them belong to the history of the progress, rather than to a treatise on the principles, of International Jurisprudence. It will be sufficient for our present purpose to notice briefly those Treaties in which this feature is most conspicuous.

CCCCIII. In the year 1519 (z), enormous territorial possessions rendered the Emperor Charles V. more powerful than any sovereign who had existed in Christendom since the reign of Charlemagne; a natural apprehension was felt by the other States of Europe, which the personal character of Charles was well calculated to foment (a). No better occasion could arise for the practical application of that refined and sagacious policy, which had so lately crossed the Alps. France took upon herself the task of adjusting the equilibrium of power in Europe; Francis I. actually concluded for this object a Treaty of Alliance with the Turks, the first Treaty contracted by an European Sovereign, and by which the Porte

(x) *Koch*, as to English conquests in France, t. i. p. 314.

(y) *Wheaton's Hist.* p. 81.

(z) *Koch*, i. 317.

(a) *Ib.* i. 318.

may be said to have been introduced into the political system of the West, and to have become a consenting party to a branch of *positive* International Law. The next step taken by France was to constitute herself protectress of the minor German States; and in the intensity of her zeal to effect her object, she availed herself of the tremendous weapon which the Religious war of the Reformation offered to her grasp. The all-important succour which Queen Elizabeth of England afforded to the revolted Netherlands was a natural consequence both of the political and religious condition of her kingdom (*b*).

But the effects which this maxim of preserving the liberty of all States by preventing the undue aggrandisement of one produced upon the policy of France, are such as must have baffled all previous calculation. Then was unfolded that remarkable page of history, in which Roman Catholic France was seen, under the governments of Richelieu and Mazarin, repressing with one hand, and that a hand of iron, the Calvinistic subjects of her own land; while with the other she supported the Protestants of Germany in their long and successful opposition to the aggressions of the Imperial power.

To preserve the Balance of Power was the real object of the terrible and desolating war of the Thirty Years. The creation of the Federal System of the Germanic Empire, and the recognition of the two new independent States—the United Netherlands, and the Swiss Cantons—guaranteed by France and Sweden in the Treaties of Westphalia (1648) and the Pyrenees (1659), were intended and supposed to form an effectual barrier to the undue preponderance of Austria, and to have secured the equilibrium, and thereby the peace of Europe.

The independence and liberties thus secured to the States of Southern Europe were, about the same time, *guaranteed*, by the Treaties of Copenhagen (1658), and Oliva (1660), to

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(*b*) *Sully's* memorable proposition to Queen Elizabeth, *Koch*, i. 519.

the States of Northern Europe (*c*), which composed, in some sort, a distinct system.

The equilibrium of power in the North, which had been endangered by the ambition of Sweden, was adjusted by the Treaties between Sweden, Denmark, Poland, and the Electorate of Brandenburg, under the guarantee of Austria, France, England, and the United Provinces.

Before the close of the century in which these Treaties were made, the aggrandisement and ambition of France united against her the same Powers which had formerly, for like causes existing elsewhere, leagued themselves with her; and to these Powers were now added Great Britain and the United Provinces.

The principal object of the Treaties of Utrecht (1713), Rastadt and Baden (1714), was to secure Europe against the universal dominion of France.

By the fundamental articles of these Treaties, the second great landmark of modern history, it was declared that the kingdoms of France and Spain should never be united under one sceptre; and that the Spanish Netherlands should be transferred to the House of Austria, to which Milan and Naples, with less reason, were also assigned (*d*).

The avowed object of the memorable wars which preceded

(*c*) *Bynkershoek* considers this forcible pacification of the North to have been an infringement of International Law: "Ut iniquum est" (he says) "principem invitum ad bellum cogere, ita et ad pacem. Cum tamen Ordines Generales sibi a Francis metuerent, et Franciæ quoque magnitudo liminibus Anglicis videretur officere, Angliæ et Sueciæ reges, itemque Ordines Generales, 23 Jan. 1668 iniverunt fœdus, quo inter alia cautum est, ut Hispani, quos inter et Francos bellum erat, quasdam conditiones, illo fœdere præscriptas, tenerentur accipere, et, iis acceptis, si Franciæ Rex pergeret regi Hispaniæ bellum facere, se armis intercessuros, coactis sic ad pacem Franciæ et Hispaniæ regibus. Rursus, cum publice non expediret Sueciæ regem etiam Daniam habere, Sueciæ regem cum Dano pacem facere cœgerunt Franci, Angli et Ordines Generales 21 Mai. 1659, erepto sic Daniæ rege mediis ex faucibus Orci, in quas se præcipitaverat, vicino potentiore in se concitato. His injuriis prætextitur studium conservandæ pacis," &c.—*Quæst. Jur. Pub.* l. i. c. xxv. s. 10.

(*d*) *Koch*, ii. 7, 27.

this Treaty, and of the convention itself, was the restoration of the Balance of Power in Europe (*e*). This Treaty may in some degree be said to have "called in the New World to "balance the Old" (*f*); the balance being partly adjusted by the cession and transference, from one European Power to another, of colonial possessions in other parts of the globe (*g*); in other words, positive International Law was carried beyond the limits of Europe.

This Treaty was made, to borrow its own language (*h*), "ad conservandum in Europa equilibrium;" indeed, the recognition of *the system of balance* may be dated from this epoch: and—if we except a partial deviation from it by the Treaty of Vienna in 1738, which seated a younger branch of the Spanish monarchy upon the throne of the Two Sicilies, it continued to govern the territorial arrangements of the South of Europe till the first French Revolution, and is mentioned in every treaty of peace till that of Luneville in 1800.

So late as 1846–7 (*i*) the Treaty of Utrecht was invoked by England when protesting against the ill-omened marriage of the Duc de Montpensier; and though the doctrine of non-revival, by express mention in subsequent Treaties, may be held to have annulled the binding force of its specific provisions, the principle of European policy, namely that the Crowns of France and Spain shall never rest upon the same head, is put on record for ever by a Treaty of this description.

(*e*) *Wheaton, Hist.* p. 125.

(*f*) *Mr. Canning's Speech* on sending the troops to Portugal.—*Speeches*, vol. vi. p. 61.

(*g*) *Wheaton, Hist.* p. 87.

(*h*) *Koch*, ii. 92.

(*i*) *Mackintosh's Works* (Speech, Feb. 19, 1816), who thinks that the Treaty of Utrecht is not now in force; but see a pamphlet on the Montpensier marriage, written, it is believed, by Lord William Hervey, Secretary to the English Embassy at Paris, 1846–7; and see this subject discussed in vol. ii. part. v.

The doctrine of the Balance of Power has of late years been attacked and ridiculed. It certainly is liable to great abuse, but, fairly explained, means no more than the right of timely prevention of a probable danger.

As a matter of fact, it has been, as has been shown, directly recognized as a principle to be maintained by the great European Powers in recent conventions of great importance.

Other instances may be cited. The principle occupies an important place in the Protocol of 1831, which preceded the establishment of the independent kingdom of Belgium, and in the Treaty of Stockholm in 1855 (*j*). Whatever may be the value of this principle, so recently and so solemnly recognised, it has never been more rudely “disturbed” than by the aggressions of Austria and Prussia upon Denmark in 1865, and of Prussia alone, in 1866, upon her weaker neighbours. It is indeed a melancholy repetition of history. We see in these acts of violence the same lust for aggrandisement, the same contempt for the weakness of the State whose territory is coveted, which animated the partitioners of Poland (*k*) and the rulers of Revolutionary and Imperial France.

(*j*) “The Queen of England, the Emperor of the French, and the King of Sweden and Norway, being anxious to avert any complication *which might disturb the existing balance of power in Europe*, have resolved to come to an understanding with a view to secure the integrity of the united kingdoms of Sweden and Norway, and have named as their Plenipotentiaries to conclude a Treaty for that purpose,” &c.—*Ann. Reg.* 1856, p. 323.

(*k*) “The principle of maintaining a balance of power, which for two centuries had distinguished Europe above other societies of nations, was now, for the first time, sacrificed; three great military Powers, instead of preventing each other’s aggrandisement, conspired to share the spoils of a neighbour. The feebleness and turbulence of Poland furnished them with a strong temptation and with some pretext, and the Governments of France and England, the first influenced by the weakness of the Court and the second influenced by the division of the people, betrayed their duty to Europe, and suffered the crime to be consummated. From that moment the security of all nations was destroyed.”—*Life of Sir J. Mackintosh*, vol. ii. p. 158.



Nevertheless, though right be thus dethroned by might for a season, justice, "the common concern of mankind," is the only true policy of all States, and the precedents of wrong sooner or later recoil on the wrongdoer. It is some satisfaction to an English writer that England neither directly nor indirectly gave countenance to these acts of violence. In 1864, Earl Russell expressed the opinion of the Government and people of England as follows:—

"Her Majesty's Government would have preferred a total silence instead of the task of commenting on the conditions of peace. Challenged, however, by M. de Bismarck's invitation to admit the moderation and forbearance of the great German Governments, her Majesty's Government feel bound not to disguise their own sentiments upon these matters. Her Majesty's Government have, indeed, from time to time, as events took place, repeatedly declared their opinion that the aggression of Austria and Prussia upon Denmark was unjust, and that the war, as waged by Germany against Denmark, had not for its groundwork either that justice or that necessity which are the only bases on which war ought to be undertaken.

"Considering the war, therefore, to have been wholly unnecessary on the part of Germany, they deeply lament that the advantages acquired by successful hostilities should have been used by Austria and Prussia to dismember the Danish Monarchy, which it was the object of the Treaty of 1852 to preserve entire" (1).

It is worthy of consideration whether a State which can and does not intervene for the protection of another unjustly attacked does really provide for its own safety or secure that peace which it so justly prizes; whether there are not cases in which both national honour and national interests are best consulted by recognizing the international obligations of succouring an oppressed member of the commonwealth of civilized States; whether the conduct of a State may not be

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(1) *Ann. Reg.* 1864, p. 237.

selfish, as well as that of an individual, and be attended with the like consequences. I may apply, with a slight alteration, the language of Mr. Gladstone as to the rights of individual men to property and religious freedom to the aggregates of men or States, and say, "The rights of each *State* "are the rights of his neighbour: he that defends one is the "defender of all, and he that trespasses on one assails all" (m). It may safely be affirmed that in the war of 1870 France was the aggressor, that the immediate reason which she assigned for beginning it was neither true nor adequate. The choice by the Spaniards of a Hohenzollern, by whomsoever suggested, for the throne of Spain, was not an act which disturbed the balance of power; it neither threatened the general liberties of Europe, nor endangered the safety of France. But is it not most probable, or indeed morally certain, that if France had not refused to co-operate with England and assist Denmark in her noble war of self-defence in 1865, or had aided the minor States whom Prussia absorbed in 1866, the war of 1870 would not have taken place? Let those who deride the notion that a State has International duties weigh well the following words of M. Prévost-Paradol:

"Le démembrement du Danemark, toléré par nous, "malgré les offres formelles de concours que nous faisait "alors l'Angleterre pour empêcher une iniquité si dangereuse, les encouragements que la Prusse a reçus de nous "dans ses desseins déclarés contre l'Autriche, le secours "qu'avec notre aveu, sinon par notre ordre, lui a prêté "l'Italie, sont des faits qui n'ont plus désormais qu'un "intérêt historique, sur lesquels il serait sans intérêt de "revenir, et qu'on peut abandonner au jugement sévère de "l'équitable postérité" (n).

The evils which result from this state of things are not

(m) Letter to the Bishop of Aberdeen in 1852, p. 14. "The rights of each *man*."

(n) *La France nouvelle*, par M. Prévost-Paradol, ch. iii. p. 373.

transient; they tend to render permanently insecure the mutual relations of independent States.

Much of the energy, freedom, and vigour which have animated, as well as the arts and sciences which have embellished and enriched Christendom, may be traced to the free competition and emulation arising from the existence of States of no considerable territorial grandeur, but members of a commonwealth which proclaimed that "Russia and Geneva had equal rights" (o).

The prevailing notion, unhappily not confined to Europe, that a State must seek territorial aggrandisement as a condition of her welfare and security, is a vulgar relapse into barbarous times, and fraught with future misery to the world (p). Hence the great evil of enormous standing armies, perpetual menaces to the liberties of mankind; hence the miserable palliations of wrong and robbery under the specious titles of "rectification of frontiers" and the like.

Hence the contempt for the feelings and wishes of the inhabitants of territories, incorporated like brute animals, by brute (q) force, into the "rectified" State. "D'un premier mal naîtraient une foule de maux. Reconnaissons donc que l'injustice est un mauvais fondement, sur lequel le monde politique ne saurait bâtir que pour sa ruine" (r).

This mode of annihilating the liberties of free men did not, speaking only of modern times, it must be admitted, begin with these later German wars. It was the radical vice and the dissolving element of the conventions which closed the European wars against France, 1814-15.

The transference of provinces and kingdoms from one

(o) *Vide supra*, pt. ii. ch. i.

(p) *Mackintosh, Memoirs*, vol. ii. p. 214.

(q) "La force matérielle, la force brutale, la guerre, puisqu'il faut l'appeler par son nom." *Chambre des Députés*, 31 janvier 1848.—*Guizot, Hist. parl. de la France*, t. v. p. 555.

(r) *Mémoire raisonné* by Talleyrand, in 1814, against the dismemberment of Saxony.

potentate to another, without the consent of the transferred inhabitants, was strongly condemned at the time by the wisest statesmen and jurists of the British Parliament (*s*). Subsequent events have proved the wisdom as well as the justice of this condemnation.

The rights of the people thus denied in Germany have been recognized in another part of the European Continent in a very remarkable manner. The Kingdom of Italy, created during the interval of which we are speaking, has been founded upon the basis of consulting the will of the inhabitants.

The means of ascertaining the wish of the people are open to considerable doubt and difficulty. The invention of the *plébiscite* is capable of being used as an engine of despotism as well as of freedom. If Italy has acquired province after province, and city after city, by this instrument, by the same she has lost and France has acquired Nice and Savoy—an acquisition from which she has derived no real benefit, and incurred much odium, and which she made (*t*) in opposition to the warning and wishes of her ally Great Britain. I may be allowed to put in contrast with this mistaken policy the cession by England in 1863, with the consent of the Great Powers, of the Ionian Islands to Greece—an act in which real homage was paid to the principle of consulting the wishes and feelings of the subjects of acquired territory.

In a civil war (*u*) the stronger party will not allow the wish of the weaker party to be so ascertained, nor, if ascertained, pay attention to it, and the intervention of a third

(*s*) *Vide supra*, pt. iii. ch. xiv.

(*t*) Lord Russell to Lord Cowley, July 5, 1859: "Her Majesty's Government have learned with extreme concern that the question of annexing Savoy to France has been in agitation. . . . If Savoy should be annexed to France, it will be generally supposed that the left bank of the Rhine, and the 'natural limits,' will be the next object; and thus the Emperor will become an object of suspicion to Europe, and kindle the hostility of which his uncle was the victim."—*Ann. Reg.* 1860, p. 243.

(*u*) *Vide supra*, pt. iv. ch. i.

Power for the purpose of securing and giving effect to this expression of opinion, such as the Prince of Orange in the English, the King of France in the American, or the King of Sardinia in the Italian revolution, cannot take place without the existence of a war between this third Power and the other belligerent in the civil contest.

I suppose it would not be denied that, in the late American civil war, the Southern States would have separated themselves from the Northern if the expression of the wishes of the inhabitants, by a vote of universal suffrage or a *plébiscite*, could have enabled them to effect this disunion, even when the civil war first broke out, and the Government of Washington declared its steadfast intention of not interfering with the status of slavery in the Southern States.

CCCCIV. From the date of the Treaty of Utrecht to the present day, the progress and fate of this principle of the Balance of Power have undergone great vicissitudes. The most convenient way of drawing attention to them is to divide the period which has elapsed between 1713 and 1879 into six Historical Epochs, namely—

1. The interval between the Treaty of Utrecht and the breaking out of the first French Revolution (1713–1789).
2. The interval between the first French Revolution and the Treaty of Vienna (1789–1815).
3. The interval between the Treaty of Vienna and the Treaty of Paris (1815–1856).
4. The interval between the Treaty of Paris and the Treaty of Prague (1856–1866).
5. The interval between the Treaty of Prague and the commencement of the Franco-German war (1866–1870).
6. The interval between 1870 and the Treaty of Berlin (1878).

1. In the first interval (1713–1789) various causes, natural and moral, conspired to disturb the equilibrium established at Utrecht. The rapid and immense aggrandisement

of Russia (*x*), emerging from Asia into Europe after the victories of Peter the Great—the depression of Sweden—the creation of the essentially military kingdom of Prussia, intervening between the Northern and Southern systems of European States, rivalling the power of Austria and causing the strange phenomenon of a union between the Houses of Hapsburg and Bourbon, dividing as it were Germany into two parts, and preparing in the opinion of many the dissolution of the Germanic Confederation—the increasing maritime preponderance of Great Britain:—these were natural causes which deranged the Balance of Power established at Utrecht, while they inflicted no open violence upon the principles of International Law. But the wars of the Austrian and Bavarian successions, and above all the first spoliation of Poland—all these transactions in which

“ Violence

Proceeded, and oppression, and sword-law,  
Through all the plain ” (*y*)—

shook to its very centre the system of International Justice. They introduced the worst of all periods which, since the introduction of Christianity, this system has experienced, viz.—

2. The period from 1789 to 1815. The aggressions of Revolutionary France during this epoch were repeatedly justified by reference to the rapine committed by Russia, Austria, and Prussia upon Poland (*z*). The bitter and degrading humiliations which the two latter Powers underwent before, by the heroic exertions of their people, they shook off the yoke of Napoleon, the bloody fields of Eylau and Smolensk, and the terrible necessity which destroyed the second capital of Russia—these were the legitimate fruits of the evil doctrine promulgated by those Powers, when they invaded and partitioned the kingdom of Poland.

The Treaty of Paris and the Congress of Vienna (1814-15)

(*x*) *Koch*, ii. 92-95.

(*y*) *Milton, Pur. Lost*, b. xi. ll. 671-3.

(*z*) *Gentz*, vol. iv. p. 50, &c.

concluded the war for the independence of Europe; and again the attempt of one nation to exercise universal dominion over others—an attempt of a far more formidable character than any which had occurred during the preceding periods—was defeated. The main object of this Treaty (*a*) was to restore the equilibrium of Europe; but many of the means by which this end was sought or was said to be effected, appear indefensible upon the true and sound principles of International Law. A terror of the consequences of the French Revolution, and of the dominion of Buonaparte, seems to have generated in the Great Powers of Europe the baneful notion that the creation of large kingdoms, by the absorption of small independent States, was the best security against a recurrence of the evils which Europe had endured for nearly a quarter of a century (*b*).

To effect this purpose, States were, in several instances, treated simply as containing so many square miles and so many inhabitants, little or no regard being paid to national feelings, habits, wishes, or prejudices. The annexation of Norway to Sweden, of Genoa to Sardinia, of Venice to Austria, and the diminution of the territory of Saxony, were among the instances of grievous violations of International Justice afforded by this Treaty, and for which the preservation of the Balance of Power was the pretext and excuse (*c*); but the true and legitimate application of that principle would have been a league of protection of the greater with the smaller

(*a*) “Les Puissances alliées réunies dans l'intention de mettre un terme aux malheurs de l'Europe, et de fonder son repos sur une juste répartition des forces entre les États qui la composent.”—*Convention signée à Paris, le 23 avril 1814: De M. et de C. t. iii. p. 8.*

(*b*) *Gentz, ubi supra.*

(*c*) “His injuriis” (says Bynkershoek, speaking of what he conceived to be infringements of International Law on the pretext of preserving the general safety of States) “prætextitur studium conservandæ pacis, quod et ipsum prætextitur injuriis, longe adhuc majoribus, quæ potissimum ab aliquot retro annis invaluerunt, quum nempe principes mutuis pactis, de aliorum principum regnis et ditionibus ex animi sententia statuerent, atque si de re sua statuerent. Has injurias peperit, et adhuc parit, *Ratio* quam vocant, *Status*.”—*Quæst. Jur. Pub. lib. i. c. xxv. s. 10.*

**States.** The policy which seeks to establish one principle of International Law upon the ruin of others, has been, and always must be, a policy as fatal to the lasting peace of the world, as the attempt to promote one moral duty, at the expense and by the sacrifice of others, is and must be fatal to the peace of an individual: "*populus jura naturæ gentiumque violans, suæ quoque tranquillitatis in posterum rescindit munimenta*" (*d*).

CCCCV. 3. During the period from the Treaty of Vienna to the Treaty of Paris (1815-1856), the principle of the Balance of Power has been, upon several occasions of great importance, most formally and distinctly recognized as an essential part of the system of International Law.

In the earlier part of this period the abuse of the principle which tainted so injuriously the Treaty of Vienna, continued in full operation. An alliance was formed between Great Britain, Russia, Austria, and Prussia, to which at the Congress of Aix-la-Chapelle, in 1818, France became also a party; the object of this alliance was never perhaps very clearly defined; but some of the contracting parties, at least, considered it to be a system of Intervention, not merely to guard against the unlawful aggrandisement of any one State, but also to prevent the happening of such internal changes in any existing State, as these Powers might consider to be of a revolutionary character, and therefore as eventually unsafe to neighbouring States. Great Britain, however, appears never to have put this construction on the

(*d*) "*Male autem a Carneade stultitiæ nomine justitia traducitur. Nam sicut, ipso fatente, stultus non est civis qui in civitate jus civile sequitur, etiam ob ejus juris reverentiam quædam sibi utilia omittere debeat: ita nec stultus est populus, qui non tanti facit suas utilitates, et propterea communia populorum jura negligat; par enim in utroque est ratio. Nam sicut civis qui jus civile perumpit utilitatis præsentis causa, id convellit quo ipsius posteritatisque suæ perpetuæ utilitates continentur: sic et populus jura naturæ gentiumque violans, suæ quoque tranquillitatis in posterum rescindit munimenta.*"—*Grotius, Prolegomena*, 18.

See *Mably's* opinion that Treaties of Partition are contrary to International Law, t. ii. pp. 64-5, 149-150.



object of the coalition; at all events, she expressed her emphatic dissent from it, upon the first occasion of its practical application in the resolutions of Austria, Russia, and Prussia, at the Congresses of Troppau and Laybach. Great Britain protested then, while her foreign affairs were under the administration of Lord Castlereagh, against the measures adopted by those Powers with respect to the revolution at Naples in 1820, and still more against the principles upon which they were said to be founded. She protested also, under the same administration, against the proceedings of the Congress of Vienna in 1822, at which the armed intervention of France in the internal affairs of Spain was sanctioned by Russia, Austria, and Prussia. Subsequently, under the wise and vigorous administration of Mr. Canning, Great Britain protested against any Intervention of the European Powers in the contest between Spain and her American Colonies, declaring that she would consider any such Intervention by force or menace as a reason for recognizing the latter without delay (*e*); and at the same time the United States of America announced, that they would consider any such Intervention as an unfriendly manifestation towards themselves.

A few years later Mr. Canning, in the House of Commons, defended the Government for not having resisted, by war, the entrance of the French army into Spain, which he admitted that the disturbance of the Balance of Power caused by this event would have justified; and, alluding to the recognition of the American Colonies, which had then taken place, made his proud and legitimate boast, "I called the New World into existence, to redress the balance of the Old."

It was at this epoch that the American President Munroe promulgated, in his annual address, an opinion which afterwards obtained celebrity under the name of the "Munroe Doctrine." An erroneous conception as to this opinion or

doctrine has very generally prevailed; but in 1862 Mr. Everett wrote a paper in the "New York Ledger" (*f*), which appears to put a proper construction on the opinion itself, and to give a correct version of the transaction in which it originated. In 1823 President Munroe said, in his annual address, as follows:—

"The late events in Spain and Portugal show that Europe is still unsettled. Of this important fact no stronger proof can be adduced than that the allied Powers should have thought it proper, on any principle satisfactory to themselves, to have interposed, by force, in the internal concerns of Spain. To what extent such interpositions may be carried on the same principle is a question in which all independent Powers whose Governments differ from theirs are interested—even those most remote, and surely none more so than the United States. Our policy in regard to Europe, which was adopted at an early age of the wars which have so long agitated that quarter of the globe, nevertheless remains the same; which is, not to interfere in the internal concerns of any of its Powers; to consider the Government *de facto* as the legitimate Government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting, in all instances, the just claims of every Power—submitting to injuries from none. But, in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied Powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our Southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition in any form with indifference. If we look to the comparative strength and resources of

(*f*) Afterwards printed in a separate form by the Loyal Publication Society, N. 34—*The Munroe Doctrine*, Sept. 2, 1863.

"Spain, and those new Governments, and their distance"  
"from each other, it must be obvious that she can never"  
"subdue them. It is still the true policy of the United"  
"States to leave the parties to themselves, in the hope that"  
"other Powers will pursue the same course" (g).

Mr. Canning had stated that if a Congress of European Powers assembled to deal with the affairs of Spanish America, he should insist on the United States being represented; and, in answer to the statement of their Minister at St. James's, that it was a traditional rule of the United States not to interfere with European politics, had replied that such a policy, however generally and formerly sound, was inapplicable to the present circumstances.

"The question was a new and complicated one in modern"  
"affairs. It was also full as much American as European,"  
"to say no more. It concerned the United States under"  
"aspects and interests as immediate and commanding as it"  
"did or could any of the States of Europe. They were the"  
"first Power established on that continent, and confessedly"  
"the leading Power. They were connected with Spanish"  
"America by their position, as with Europe by their rela-"  
"tions; and they also stood connected with these new States"  
"by political relations. *Was it possible that they could*"  
"*see with indifference their fate decided upon by Europe?*"  
"Could Europe expect this indifference? Had not a new"  
"epoch arrived in the relative position of the United States"  
"towards Europe, which Europe must acknowledge? *Were*"  
"*the great political and commercial interests which hung*"  
"*upon the destinies of the new continent to be canvassed and*"  
"*adjusted in this hemisphere without the co-operation or even*"  
"*knowledge of the United States?* Were they to be can-"  
"vassed and adjusted, he would even add, without some"  
"proper understanding between the United States and Great"  
"Britain, as the two chief commercial and maritime States"  
"of both worlds? He hoped not, he would wish to per-"  
"suade himself not."

\* It was in consequence of this urgent pressure that President Munroe uttered the language which has been cited from his address. I may observe, in passing, that the doctrine contained in it, whatever that be, has not been corroborated by an act of the legislature of the United States. But the doctrine does not, as has been sometimes supposed, deny the right of European countries to rule their colonies in America, or their right of further colonization in America. It protests against war being waged in America by European Powers to preserve the equilibrium of States in Europe.

It was considered at the time as proclaiming a policy identical with that of Mr. Canning, and was hailed with every expression of joy by the liberal statesmen of the British Parliament. The indirect consequence was to redress in some respects the European Balance of Power, and to justify the language already cited of Mr. Canning on this subject.

CCCCVI. It is true that the military Intervention of Great Britain in the affairs of Portugal in 1826 took place in order to discharge the obligations of Treaties, and, at the request of Portugal herself, to protect her against the hostile aggressions of Spain; and not in order, directly at least, to restore the Balance of Power. But the Intervention of Great Britain, Austria, Russia, Prussia, and France in the Belgian (*h*) Revolution of 1830, had, as has been already seen, for one of its avowed objects, the establishment of a just Balance of Power, and the security of the general peace.

On February 19, 1831, the Intervening Powers signed a Protocol, in which the enunciation of this principle occupied a very conspicuous place.

“Les Plénipotentiaires,” it said, “des Cours d’Autriche, de France, de la Grande-Bretagne, de Prusse, et de Russie, s’étant assemblés, ont porté toute leur attention sur les interprétations diverses données au Protocole de la

(*h*) *Hansard, Parl. Deb.* vol. xxviii. pp. 1133–1163.

*Martens, Nouv. Rec.* t. i. p. 70.

“ Conférence de Londres, en date du 20 décembre 1830, et  
“ aux principaux Actes dont il a été suivi. Les délibéra-  
“ tions des Plénipotentiaires les ont conduits à reconnaître  
“ unanimement, qu’ils doivent à la position des cinq Cours,  
“ comme à la cause de la paix générale, qui est leur propre  
“ cause, et *celle de la civilisation européenne, de rappeler ici le*  
“ *grand principe de droit public*, dont des Actes de la Con-  
“ férence de Londres n’ont fait qu’offrir une application  
“ salutaire et constante.

“ D’après *ce principe d’un ordre supérieur*, les Traités ne  
“ perdent pas leur puissance, quels que soient les changemens  
“ qui interviennent dans l’organisation intérieure des peuples.  
“ Pour juger de l’application que les cinq Cours ont faite de  
“ ce même principe, pour apprécier les déterminations qu’elles  
“ ont prises relativement à la Belgique, il suffit de se reporter  
“ à l’époque de l’année 1814.

“ A cette époque les Provinces Belges étaient occupées  
“ militairement par l’Autriche, la Grande-Bretagne, la Prusse,  
“ et la Russie; et les droits que ces Puissances exerçaient  
“ sur elles furent complétés par la renonciation de la France  
“ à la possession de ces mêmes Provinces. Mais la renoucia-  
“ tion de la France n’eut pas lieu au profit des Puissances  
“ occupantes. Elle tint à une pensée d’un ordre plus élevé.  
“ Les Puissances, et la France elle-même, également désin-  
“ téressées alors comme aujourd’hui dans leurs vues sur la  
“ Belgique, en gardèrent la disposition et non la souveraineté,  
“ dans la seule intention de faire concourir les Provinces  
“ Belges à *l’établissement d’un juste équilibre en Europe*, et au  
“ maintien de la paix générale. Ce fut cette intention qui  
“ présida à leurs stipulations ultérieures; ce fut elle qui unit  
“ la Belgique à la Hollande; ce fut elle qui porta les Pui-  
“ sances à assurer dès lors aux Belges le double bienfait  
“ d’institutions libres, et d’un commerce fécond pour eux en  
“ richesse et en développement d’industrie.

“ L’union de la Belgique avec la Hollande se brisa. Des  
“ communications officielles ne tardèrent pas à convaincre  
“ les cinq Cours, que les moyens primitivement destinés à

« la maintenir ne pourraient plus ni la rétablir pour le moment, ni la conserver par la suite; et que désormais, au lieu de confondre les affections et le bonheur des deux Peuples, elle ne mettrait en présence que les passions et les haines, elle ne ferait jaillir de leur choc que la guerre avec tous ses désastres. Il n'appartenait pas aux Puissances de juger des causes qui venaient de rompre les liens qu'elles avaient formés. Mais quand elles voyaient ces liens rompus, il leur appartenait d'atteindre encore l'objet qu'elles s'étaient proposé en les formant. Il leur appartenait d'assurer, à la faveur de combinaisons nouvelles, cette tranquillité de l'Europe, dont l'union de la Belgique avec la Hollande avait constitué une des bases. Les Puissances y étaient impérieusement appelées. Elles avaient le droit, et les événemens leur imposaient le devoir, d'empêcher que les Provinces Belges, devenues indépendantes, ne portassent atteinte à la sécurité générale, et à l'équilibre européen » (i).

The Kingdom of Belgium was thus founded upon the principle of maintaining the Balance of Power in Europe. In the year 1870 it was thought necessary by the British Government to enter into further separate Treaties with France and Prussia, then at war with each other, by which Treaties England undertook, in the event of either of these two Powers attacking Belgium, to become the ally of the other Power for the purpose of defending Belgium (j).

The Grand Duchy of Luxemburg was neutralized in 1867 by a Treaty which is referred to at length hereafter (k).

During the war between Prussia and France in 1870-71, the neutrality of Belgium and Luxemburg was respected by both belligerents.

The intervention of France, Great Britain, and Russia in

(i) *Protocols of Conferences in London relative to the Affairs of Belgium*, art. i. 1830-31, pp. 59-60; and *State Papers*, vol. xviii. p. 779, &c.

(j) *Vide supra*, p. 113.

(k) *Vide supra*, p. 115, and *post* p. 600.

the Greek Revolution of 1828, as has been already observed, was not originally founded upon the plea of preserving the Balance of Power, but was placed upon other grounds.

In April 1834 a Quadruple Alliance was formed between France, England, Portugal, and Spain, by which the two former undertook to assist the two latter Powers in fulfilling a mutual agreement to expel Don Miguel, the Pretender to the throne of Portugal, and Don Carlos, the Pretender to the throne of Spain, from the territories of the two kingdoms.

“In consequence of this agreement” (it is said in the preamble of this Treaty of the Quadruple Alliance), “their Majesties the Regents have addressed themselves to their Majesties the King of the United Kingdom of Great Britain and Ireland, and the King of the French; and their said Majesties, considering the interest they must always take in the security of the Spanish monarchy, and being further animated by the most anxious desire to assist in the establishment of peace in the Peninsula, as well as in every other part of Europe; and his Britannic Majesty considering, moreover, the special obligations arising out of his ancient alliance with Portugal; their Majesties have consented to become parties to the proposed engagement.”

In August 1834 a Treaty of additional articles was concluded, whereby France undertook to prevent the importation of supplies and ammunition to the party of Don Carlos in Spain; and Great Britain undertook to supply arms to the Spanish Government, and assist it with naval forces. Great Britain relaxed the provisions of her Foreign Enlistment Act, and permitted, by an Order in Council, her subjects to engage in the service of the Spanish Government, and a corps of volunteers was raised and commanded by a British officer.

The independent existence of the Turkish Empire at Constantinople has become, in the opinion of the principal European Powers, necessary to the preservation of the

"Balance of Power; so great, and so little to be foretold, have been the vicissitudes of the kingdoms of the world, and especially of Europe, since the sixteenth century.

It is not true that Christian Europe requires, as has been sometimes said, as a condition of her security, the existence of a Mohammedan Power within her boundaries; but that the preservation and maintenance of the general peace demand (*l*) that the Ottoman dominions should not be absorbed into the territories of any of the existing European communities (*m*). It is conceivable that Constantinople may again become the seat of a Christian Greek Govern-

(*l*) "Il y a, dans les relations de l'Europe chrétienne avec l'Empire ottoman, un vice incurable: nous ne pouvons pas demander aux Turcs ce que nous leur demandons pour leurs sujets chrétiens, et ils ne peuvent pas, même quand ils se résignent à nous le promettre, faire ce que nous leur demandons. L'intervention européenne en Turquie est à la fois inévitable et vaine. Pour que les gouvernements et les peuples agissent efficacement les uns sur les autres par les conseils, les exemples, les rapports, et les engagements diplomatiques, il faut qu'il y ait, entre eux, un certain degré d'analogie et de sympathie dans les mœurs, les idées, les sentiments, dans les grands traits et les grands courants de la civilisation et de la vie sociale. Il n'y a rien de semblable entre les chrétiens européens et les Turcs; ils peuvent, par nécessité, par politique, vivre en paix à côté les uns des autres; ils restent toujours étrangers les uns aux autres; en cessant de se combattre, ils n'en viennent pas à se comprendre. Les Turcs n'ont été en Europe que des conquérants destructeurs et stériles, incapables de s'assimiler les populations tombées sous leur joug, et également incapables de se laisser pénétrer et transformer par elles ou par leurs voisins.

"Combien de temps durera encore le spectacle de cette incompatibilité radicale qui ruine et dépeuple de si belles contrées, et condamne à tant de misères tant de millions d'hommes? Nul ne peut le prévoir; mais la scène ne changera pas tant qu'elle sera occupée par les mêmes acteurs."—*Guizot, Mémoire de mon Temps*, t. vi. ch. xxxvii. pp. 257-8.

"Les Turcs sont aujourd'hui ce qu'ils étaient au quinzième siècle, des Tartares campés en Europe."—*J. le Maître*, cited by *Lemoine, Journal des Débats* du 28 Mai, 1876.

(*m*) The Porte concluded, on January 21, 1790, a Treaty against Austria and Russia with Prussia, in which that Power "à cause du préjudice que les ennemis, en passant le Danube, ont apporté à la balance du pouvoir désiré et nécessaire, promet de déclarer la guerre de toutes ses forces aux Russes et aux Autrichiens," &c.—*Koch, Hist. des Tr.* t. iv. p. 419.



ment, capable of maintaining the position and supporting the character of an independent kingdom; and were such an event to occur, the Balance of Power might be at least as well secured as by the present state of things. The same remark applies to the Pachalic of Egypt, holden under the *suzeraineté* of the Porte, which could not be included in the possessions of any other European Sovereign without danger to the security of other European States.

During the epoch now under discussion, there have been several Interventions by the European Powers in the affairs of Turkey.

After the battle of Navarino and the recognition of the independence of Greece, war still continued between Russia and Turkey, and was not altogether concluded until the framing of the Treaty of Adrianople in 1829.

The Intervention of the Great Powers in Egyptian affairs between 1833 and 1841 has been already referred to in the chapter on Egypt (*n*). While these pages are being prepared for the press (June 1879), the Khedive has been deposed by the Porte, apparently on the application and intervention of the Great Powers.

In 1847, England, France, and Spain intervened in the internal affairs of Portugal, at the request of the Queen of that country, and put down by force the rebellion that harassed her subjects; but at the same time guaranteed to the insurgents, under certain conditions, an amnesty for political offences, and certain improvements in the Constitutional Government. In this mediation England took the leading part (*o*).

In 1848, France and England endeavoured jointly to mediate in the disturbances which agitated every kingdom in the Italian peninsula; and in 1849, the Government of England asserted her right of intervening, by the expression

(*n*) *Vide supra*, pp. 143-155.

(*o*) *Ann. Reg.* 1840, p. 346, June 12 & 13.

of opinion at least, in the civil contest between Austria and Hungary (*p*).

In 1851 the Governments of France and England addressed notes, the former to the Powers who had signed the Treaty of Vienna, the latter to the Germanic Confederation, protesting against the suggested incorporation of Austrian provinces, not being German, into the Germanic Confederation. Such an event, it was urged, though unconnected with any acquisition of new territory, would clearly affect the Balance of Power (*q*).

Upon the same principle, on August 2, 1850, Austria, France, England, Prussia, Russia, and Sweden, put forth a Protocol, respecting the succession to the Danish monarchy, in which "the maintenance of the integrity" of that monarchy was said "to be connected with the general interests of the *Balance of Europe*, and of high importance to the preservation of peace;" and therefore, at the request of the King of Denmark, they put forth a declaration to the above effect (*r*).

The same Powers, on May 8, 1852, concluded a Treaty, binding themselves to recognize Prince Christian of Sleswig-Holstein and his heirs male as the lawful successors to the throne of Denmark (*s*).

In 1851, the doctrine of Intervention was vigorously enforced on the South American Continent, in a manner well deserving attentive consideration (*t*).

That portion of South America which is politically and geographically designated as the States of La Plata, on account of the position they occupy in the great basin of this

(*p*) *Ann. Reg.* 1848-9, vol. xc. p. 171; vol. xci. chap. vi.

(*q*) See these Notes *in extenso*, *Ann. des Deux Mondes* (1851-2), French Memorandum, p. 953; English Note (*Lord Cowley*), p. 959, "qu'il prévoit en même temps qu'un pareil changement dérangerait l'équilibre général," &c.

(*r*) *Ann. Reg.* 1852, p. 440.

(*s*) *Ann. des Deux Mondes* (1851-2), pp. 960-1.

(*t*) *Ib.* (1851-2), pp. 27, 865, 881, 978.

river, consists of the Argentine Confederation (then under the dominion of General Rosas), the Oriental Republic of Uruguay, and Paraguay. Paraguay and Uruguay (*u*) touch the confines of the Empire of Brazil. Rosas had for some time threatened directly the independence of Paraguay (formerly a province of the Viceroyalty of Buenos Ayres), which he claimed as a province of the Argentine Confederation, while at the same time he manifested an intention of indirectly dominating over Uruguay, the capital of which, Monte Video, had been for a long time assailed by General Oribe, his ally. The Emperor of Brazil, greatly preferring Paraguay and Uruguay, as at present governed, for his neighbours, to those countries under the domination of Rosas, suddenly, and without any concert with the European Powers, intervened with an armed force in the quarrel between Monte Video and the Argentine Republic, and destroyed in a moment the power of Rosas, which had for many years embarrassed the diplomacy of England and France (*x*). Brazil has entered into five Treaties with the Oriental Republic of Uruguay, forming, in fact, a code or system of general relations between the two States, but especially regulating the mode of Intervention accorded to Brazil in the affairs of Uruguay (*y*).

In 1852-3 (*z*), this doctrine of Intervention to prevent the undue aggrandisement of any one State by the absorption of the territories of another, was applied upon a very important occasion by England and France to the American Continent and the West Indies. These two Governments invited the North American United States to accede to a tripartite Treaty, the object of which was, to bind the three

(*u*) *Vide supra*, p. 197.

(*x*) *Ann. des Deux Mondes* (1850), p. 1052, *Question de la Plata*; *ib.* (1851), pp. 27, 865, &c.

(*y*) See these treaties *in extenso*, *Ann. des Deux Mondes* (1851-2), pp. 979-986.

(*z*) See *Correspondence between the United States, Spain, France, and England concerning alleged projects of Conquest and Annexation of the Island of Cuba*, presented to the House of Commons, April 11, 1853.

Governments to renounce both now and hereafter all intention of appropriating the Island of Cuba, or, in other words, to express their determination to abide by the *status quo* in the West Indies (a). The North American United States refused to be parties to this Treaty; but the right of Intervention, on the part of England and France, was steadily proclaimed, both on account of their own interests, and on account of those of friendly States in South America, as to the "present distribution of power" (b) in the American seas.

In 1854 a war was waged by England, France, and Turkey against Russia for the avowed purpose of preserving the Balance of Power, and for preventing on that account the absorption of European Turkey into the territories of Russia (c).

The following is the text of the Convention concluded

(a) *Lord Cowley's Despatch to Lord John Russell*, January 24, 1853.

(b) *Letter of Lord John Russell to Mr. Campbell*, February 16, 1853.

(c) "Mr. Sidebottom, M.P., speaking at Glossop, quoted the following opinion expressed by Mr. Gladstone in 1854:—'I apprehend that what we think to secure by the war is not the settlement of any question regarding the internal government of Turkey, as this will be a work for many years, but there is the danger of the absorption of the Turks by Russia, which will bring upon us greater evils than those which already exist. This we are called upon to resist by all means in our power.' These words were spoken by Mr. Gladstone in the House of Commons on March 6, 1854, and Mr. Sidebottom said it would be difficult to find language more applicable to the present moment, or which expressed the situation with more exactness or more precision. A Sheffield Liberal forwarded the extract to Mr. Gladstone, asking him if he really did utter the sentences attributed to him, as they appeared to falsify his present position. Mr. Gladstone replied as follows:—'Sir,—I do not doubt I said, and it was quite true if I did, that the immediate object of the war in 1854 was to repel the aggression of Russia upon Turkey. Russia made a demand at that time which did not concern the redress of the Christian grievances, but in the opinion of all Europe attacked Turkey in violation of public law. The war aimed at repressing that violation of law; but with it were combined measures which were then believed to be realities, and to provide for the redress of grievances.—Your faithful servant, W. E. Gladstone. December 11.'"—*The Times*, Tuesday, December 18, 1877.

between England, France, and the Porte, signed March 13, 1854 :—

“As her Majesty the Queen of Great Britain and Ireland, and his Majesty the Emperor of the French, have been requested by his Highness the Sultan to assist him in repelling the attack which has been made by his Majesty the Emperor of All the Russias on the territory of the Sublime Porte—an attack by which the integrity of the Ottoman Empire and the independence of the Sultan’s throne are endangered—and as their Majesties are perfectly convinced that the existence of the Ottoman Empire in its present extent is of essential importance to the balance of power among the States of Europe, and as they have in consequence agreed to afford his Highness the Sultan the assistance which he has requested to this end,—their aforesaid Majesties and his Highness the Sultan have deemed it proper to conclude a Treaty, so as to attest their intentions in conformity with the above, and to settle the manner in which their aforesaid Majesties shall lend their assistance to his Highness” (d).

The ground of a religious protectorate, upon which Russia defended her aggression upon the Porte, will presently be considered. By Article VII. of the Treaty of Paris, March 30, 1856, England, Austria, France, Russia, Prussia, and Sardinia—after declaring “the Sublime Porte admitted to participate in the advantages of the public law and system (*concert*) of Europe”—“engage each on his part to respect the independence and the territorial integrity of the Ottoman Empire; guarantee in common the strict observance of that engagement, and will in consequence consider

(d) The views which induced Sardinia to join her forces to those of France and England, and the opinion held by Count Cavour regarding the course pursued by Russia and the advisability of opposing it by arms, are given in a speech delivered by the Count in the Sardinian Chamber on February 6, 1855.—See *Ouvrages politiques-économiques par le Comte Camille Benso di Cavour* (ed. 1855), p. 580. See Appendix.

- “any act tending to its violation as a question of general “interest” (e).

In the preceding year, 1855 (November 21), in a Treaty between England, France, and the King of Sweden and Norway, it is recited that these Powers, “being anxious to “avert any complication which might disturb the *existing* “*Balance of Power in Europe*, have resolved to come to “an understanding with a view to secure the integrity “of the United Kingdoms of Sweden and Norway, and “have named their Plenipotentiaries to conclude a Treaty “for that purpose” (f).

CCCCVIA. 4. The interval between the Treaty of Paris and the Treaty of Prague (1856-1866).—In 1860, after the war between France and Italy against Austria had ceased, and after the stipulations between France and Austria by the Treaty of Zürich (November 1859) had become impracticable, Tuscany, Parma, Modena, and the Legations having by the vote of their National Assemblies united themselves to Sardinia, France obtained, in an evil hour for herself, the cession of Savoy and Nice as an alleged compensation to the Balance of Power said to be disturbed by the increase of territory obtained by Sardinia in Italy. England intervened by a strong remonstrance, which cannot be read without profit at the present time.

“Her Majesty’s Government,” Earl Russell wrote to Earl Cowley, the English Ambassador at Paris, “must be “allowed to remark that a demand for cession of a neighbour’s territory, made by a State so powerful as France, “and whose former and not very remote policy of territorial “aggrandisement brought countless calamities upon Europe, “cannot well fail to give umbrage to every State interested “in the *Balance of Power* and in the maintenance of the “general peace. Nor can that umbrage be diminished by “the grounds on which the claim is founded; because, if a

(e) *Ann. Reg.* 1856, p. 313.

(f) *Ibid.* p. 323.

“great military Power like France is to demand the territory of a neighbour upon its own theory of what constitutes geographically its proper system of defence, it is evident that no State could be secure from the aggressions of a more powerful neighbour; that might, not right, would henceforward be the rule to determine territorial possession; and that the integrity and independence of the smaller States of Europe would be placed in perpetual jeopardy” (g).

It is true that by the Treaty between France and Sardinia which recorded this cession, it was provided that the consent of the inhabitants should be previously obtained (h), and that a *plébiscite*—to use the new and ominous expression on this subject—of the ceded countries gave a colour to the cession; but the value of an expression of opinion of this kind depends entirely upon the freedom with which it was uttered. It is difficult, having regard to the circumstances, to maintain that this essential element of validity was present when this *plébiscite* was arranged. It has been said that it was in an evil hour for France that this territorial acquisition was made, and surely the truth of this remark cannot now be gainsayed, when Germany has justified, in some degree at least, her acquisition of Alsace and Lorraine—perhaps the severest blow ever dealt to France—by a reference to this unhappy precedent. But the mischief of this example was earlier felt. The spoliation of Denmark, Hanover, Nassau, and free Frankfort in 1866

(g) *Ann. Reg.* 1860, pp. 257-8.

(h) “It is understood between their Majesties that this annexation shall be effected without any constraint of the wishes of the population, and that the Governments of the Emperor of the French and the King of Sardinia will concert together as soon as possible upon the best means of appreciating and verifying the manifestation of these wishes.”—*Art. 1, Treaty of Annexation of Savoy and Nice to France, Ann. Reg.* 1860, p. 240.

It was also stipulated, by Art. 11, that the Emperor of the French was “to come to an understanding” with the Powers represented at the Congress of Vienna and the Swiss Confederation on this subject.

has been already mentioned (i). No event for many years has given so rude a shock to the liberties of States, and the principle of the Balance of Power, intended to be, and valuable only as, the outwork of those liberties. England at least desired—the apology for her is indeed unsatisfactory—to intervene, and would have done so with the alliance of France. But France stood aloof—partly hampered by her own precedent, partly, it is to be feared, waiting for an opportunity of repeating it—and not until 1870 did she intervene by war to redress the Balance of Power upon an immediate ground which did not justify the intervention.

An intervention in the affairs of Mexico (j) took place in 1861, by England, France, and Spain, founded, apparently, upon the same principles—namely, of demanding payment for debts long due to their subjects, satisfaction for outrages committed on them, and some security against their recurrence. The object of the Convention, signed at London, October 31, 1861, by the three Powers, was “to demand  
“more efficacious protection for the persons and properties  
“of their subjects, as well as the fulfilment of the obligations  
“contracted towards their Majesties; and they engaged not  
“to seek for themselves, in the employment of the con-  
“templated coercive measures, any acquisition of territory,  
“or any special advantage, nor to exercise in the internal  
“affairs of Mexico any influence of a nature to prejudice  
“the right of the Mexican nation to choose and constitute  
“the form of its government.”

The debt to France was very small, the debt to England was very large, and had been repeatedly guaranteed by

(i) *Vide supra*, pp. 51 and 171.

(j) *Dana's Wheaton*, p. 126.

*Laurence's Wheaton* (French ed.), vol. ii. p. 339.

*Hertslet's Treaties*, vol. xii. p. 472.

See *Rec. gén. de Traités, par Samwer (contin. de Martens)*, t. iv. 2<sup>e</sup> partie, p. 143; “Convention conclus à Londres, le 31 octobre 1861, entre l'Espagne, la France et la Grande-Bretagne, pour combiner une action commune contre le Mexique.”



Mexican Governments; and the revenues of the Customs had been formally pledged for their discharge. A serious difference of opinion began to show itself between the Commissioners of the three Powers at the first conference, which was held at (*k*) Vera Cruz. The Treaty of Soledad (*l*), February 1862, between the English, Spanish, and French Commissioners and the Minister of the Mexican Republic, was not ratified by the Emperor, and at the last conference of the three Powers at Orizaba (April 1862) this difference so increased as to dissolve the alliance. England and Spain then withdrew from common action with France. This difference was, in truth, one of principle, which affected the whole object of the expedition. The Queen of England had said, in her speech to Parliament,—

“ The wrongs committed by various parties and by successive Governments in Mexico upon foreigners resident within the Mexican territory, and for which no satisfactory redress could be obtained, have led to the conclusion of a convention between her Majesty, the Emperor of the French, and the Queen of Spain, for the purpose of

(*k*) *Rec. gén. de Traités, par Samwer*, p. 145: “ Proclamation adressée à Vera-Cruz, le 10 janvier 1862, par les représentants de l'Espagne, de la France et de la Grande-Bretagne au peuple mexicain.”

(*l*) “ Convention préliminaire entre le Mexique d'une part, et l'Espagne, la France, et la Grande-Bretagne d'autre part, relative aux réclamations des sujets respectifs, signée à la Soledad le 19 février 1862.

“ Art. 1. Le gouvernement constitutionnel qui est actuellement au pouvoir dans la république mexicaine ayant informé les commissaires des Puissances alliées qu'il n'a pas besoin de l'assistance offerte par elle avec tant de bienveillance au peuple mexicain, parce que ce peuple contient en lui-même des éléments suffisants de force pour se préserver de toute révolte intérieure, les Alliés auront recours à des traités pour présenter toutes les réclamations qu'ils sont chargés de faire au nom de leurs nations respectives.

“ Art. 2. Dans ce but, et les représentants des Puissances alliées protestant qu'ils n'ont nullement l'intention de nuire à la souveraineté ou à l'intégrité de la république mexicaine, des négociations seront ouvertes à Orizaba, où les commissaires des Puissances alliées et les ministres de la république se rendront, à moins que des délégués ne soient nommés par les deux parties d'un consentement mutuel.”—*Ib.* p. 147.

“regulating a combined operation on the coast of Mexico,  
“with a view to obtain that redress which has hitherto been  
“withheld” (m).

The English intervention was strictly limited to these objects, which it accomplished; while France thought it necessary to go further, in order to obtain, as she said, security against the recurrence of the evils complained of; but the Emperor Napoleon desired, as he afterwards announced, to support the position of the Latin race in America, to prevent the United States from acquiring more Mexican territory, and to establish an empire which might be favourable to France, and aid, as it was supposed, in assisting the development of French commerce with Central America. England, and subsequently Spain, declined altogether to assist in the furtherance of any of these schemes. The United States had been invited to join the original convention, but had refused to do so, not because they were at that time distracted by civil war, but, as it should appear from their public statements, partly because it was contrary to their traditional policy to enter into European alliances, but principally because they could not endure the creation of a new monarchy on the American continent. They even refused to acknowledge the *de facto* sovereignty of Maximilian, at a time when it certainly existed, and was recognized by every other country; or even to recognize as a belligerent the party in the State which supported him, or the blockade which he instituted; while at the same time they were loud and earnest in their demand that their own blockade of the revolted Southern States should be recognized, to an extent and with a strictness which, if it did not exceed, went to the very utmost limit of the severest application of International Law upon the subject. It will hardly be denied by any dispassionate historian or jurist that they allowed their dislike of a monarchy and of European intervention in American

affairs to make them disregard, upon the subject of *de facto* sovereignties and belligerent rights, the principles of International Law which their executive and their judicial tribunals had always maintained. The failure of the French attempt, the withdrawal of their forces from the Mexican territory, the murder of the ill-fated and deserted Maximilian, and the reconstruction of a Mexican Republic, are well-known portions of contemporary history, which are without the province of this work.

The Balance of Power has been more disturbed by the aggressions of Prussia and Austria upon Denmark, and of Prussia upon her weaker neighbours, than by any triumph of the system of standing armies since Napoleon the First was at Berlin. I must observe that if France had accepted the invitation of England in 1864, and acted with her for the protection of Denmark, in all probability Christendom and civilization would have been spared the disgrace and curse which afflicted them in 1870 (*n*).

CCCCVIB. 5. The interval between the Treaty of Prague and the commencement of the Franco-German war, 1866-1870.—The Grand Duchy of Luxemburg belonged to the King of Holland as Grand Duke, and formed part of the old

(*n*) Earl Russell's answer to Count Bismarck, August 1864:—"Her Majesty's Government are also bound to remark, when the satisfaction of national feelings is referred to, that it appears certain that a considerable number—perhaps two or three hundred thousand—of the loyal Danish population are transferred to a German State; and it is to be feared that the complaints hitherto made respecting the attempts to force the language of Denmark upon the German subjects of a Danish Sovereign will be succeeded by complaints of the attempt to force the language of Germany upon the Danish subjects of a German Sovereign.

"Her Majesty's Government had hoped that at least the districts to the north of Flensburg would, in pursuance of a suggestion made by the Prussian Plenipotentiary in the Conference of London, have been left under the Danish Crown.

"If it is said that force has decided this question, and that the superiority of the arms of Austria and Prussia over those of Denmark was incontestable, the assertion must be admitted. But in that case it is out of place to claim credit for equity and moderation."—*Ann. Reg.* 1864, pp. 237, 238.

German Confederation which was destroyed by Prussia, as mentioned above, at the close of the war of 1866 (o).

On May 11, 1867, after a conference between England, France, Austria, Prussia, Russia, and Holland, to which Italy was afterwards admitted, and in which Belgium was also represented, a Treaty was signed, by the provisions of which the sovereignty of Luxemburg was preserved to the King Grand Duke and his successors; the Grand Duchy was neutralized in a manner presently to be stated; the fortifications were to be destroyed and not restored; the Prussian troops were to evacuate the place, and no military establishment was to be kept up there.

The neutralization article was as follows:—

“ART. 2. The Grand Duchy of Luxemburg, with the limits determined by the Act annexed to the Treaties of April 19, 1839, under the guarantee of the Courts of Great Britain, Austria, France, Prussia, and Russia, shall henceforth form a perpetually neutral State.

“It shall be bound to observe the same neutrality towards all other States.

“The high contracting parties engage to respect the principle of neutrality stipulated by the present Article.

“That principle is and remains placed under the sanction of the collective guarantee of the Powers signing parties to the present Treaty, with the exception of Belgium, which is itself a neutral State” (p).

The main object of this Treaty was to preserve the Balance of Power by preventing any single State from fortifying and holding the town of Luxemburg, reputed to be one of the strongest places in Europe.

6. CCCCVIc. The interval between 1870 and the Treaty of Berlin, 1878.—France proclaimed war against Prussia on July 19, 1870. On September 1 in the same year, the Prussian victory at Sedan had destroyed the French army, and

(o) *Ante*, pp. 115, 168.

(p) *Ann. Reg.* 1867, p. 225.

the Emperor of the French was a prisoner. On March 1, 1871, the German troops entered Paris as conquerors. On the 2nd the preliminary Treaty of Peace, which had been signed at Versailles on February 26, was confirmed by the National Assembly; and on the 3rd, Paris was evacuated by the Germans.

Before this great event M. Thiers had vainly sought the intervention of the Great Powers of Europe against the disturbance of the Balance of Power caused by the demands of the victorious Germans, and especially the cession of Alsace and Lorraine.

Count Beust, in a despatch to the Count de Chotek at St. Petersburg, had uttered the sentence afterwards so famous:—"Le fait est que l'on n'aperçoit nulle part des apparences d'interposition *et surtout je ne vois plus d'Europe*" (q).

History does not furnish us with any precedent for so rapid and complete a reverse of fortune, nor so rapid and complete a restoration, as France has exhibited before the end of this epoch. The unconquered energies of her people have, while I write, restored her to her proper place in the great community of European States. The latter part of this epoch is occupied by still more momentous events.

In 1870 the Pope ceased to be a temporal Sovereign. On September 20 the troops of the King of Italy entered Rome, and a Royal decree, on October 9, declared that Rome and the Roman provinces constituted an integral part of the Kingdom of Italy. The Pope remained a great spiritual chief, recognized as such by all States, but with no power of enforcing his authority, except that which he might derive from the Municipal Law of any particular State.

During this epoch also a great revolution has been effected

(q) See the *Austrian Red Book*, December 1870, and the full citation of letters and despatches in the *Journal des Débats*, le 26 Décembre, 1872.

in the general European system. Turkey has been deprived of her most important European dominions, and is left with a very insecure and uncertain hold on those which she nominally retains. Russia has made a great advance in power, and more especially, as will presently be seen, in the character of guardian of Christians in Mohammedan territory.

The general effect, as well as the creation or recognition of new Christian States consequent on the Treaty of Berlin (1878), has been already discussed (*r*).

The alteration thereby caused to the Balance of Power is obvious: the weights are shifted, the changes are material, and it does not require much sagacity to foresee that the present arrangement has the seeds of no distant dissolution thickly sown in it.

In the epoch now under consideration, certain elements in the Balance of Power have been called into more prominent existence than at any earlier period. The mutual dislike of the Slav (*s*) and the Greek materially influenced the war which preceded the Treaty of Berlin, and the conditions of that Treaty. Questions of ecclesiastical discipline had their share in the events which led to the conduct and conclusion of this war. The Emperor of Russia, though always in words maintaining his right and duty to uphold the Greek Church and race, was embarrassed by the necessity of maintaining his hereditary position as chief of the Slavonic people. The Patriarch of Constantinople had recently insisted on his right to the obedience of the Patriarch of Bulgaria, and eventually went so far as to excommunicate him for contumacious disobedience to the orders of his lawful superior. The consequence of this state of things was that Russia, while her supposed patronage of Greece injured that country in the opinion of those States who looked with alarm at the increasing power and influence of her alleged protectress, was in reality very remiss in

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(*r*) See pp. 122-142, 300.

(*s*) See Gibbon's fifty-fifth chapter for the early history of the Slavonic races.

advocating the claims of Greece, preferring on almost every occasion those of the Slavonic States.

In July 1875 an insurrection broke out amongst the Christians in Herzegovina. On December 30, 1875, the now famous "Andrassy Note" was despatched from Buda-Pest to London, Paris, and Rome. It had been agreed upon by Austria-Hungary, Russia, and Germany, and drawn up by Count Andrassy, the Chancellor of the Austro-Hungarian Empire (*t*). It contained five definite propositions for the better government of the revolted provinces of the Porte. The Sultan answered that he was ready to put in execution four of these propositions, and effect the fifth in a better way. Practically their execution was evaded, and none were carried into effect. In May 1876 the three Imperial Courts put forth the Berlin Memorandum on the subject of the misgovernment of the Christians by the Porte and the proposed remedies, but no direct intervention, *viâ facti*, in the affairs of Turkey ensued.

In the beginning of July in the same year, the Montenegrins, who had previously been rendering active assistance to the insurgents, openly declared war against the Porte; and Servia simultaneously joined in the struggle (*u*), "in order," said its ruler, Prince Milan, "to join his arms to those of Bosnia and Herzegovina, to secure the liberation of the Slavonic Christians from their state of oppression." In the campaign which followed, the Servians, whose force was swelled by large numbers of Russian volunteers, were almost uniformly unsuccessful. Their positions in the Morava valley were captured in a series of engagements, commencing on October 19; Alexinatz was entered on the 31st, and by November the road to Belgrade lay open to the Turkish army. A short armistice, procured by the peremptory interposition of Russia, was agreed upon, during

(*t*) *Ann. Reg.* 1876, *Pub. Doc.*; *Parl. Papers*, 1876, *Turkey* No. 2.

(*u*) For the Servian War manifesto, see *Parl. Papers*, 1876, *Turkey* No. 8, p. 358.

which a Conference of the Plenipotentiaries of the Great Powers and of Turkey met at Constantinople. The proposals there made were rejected by the Porte, as derogating from its independence, and as being unnecessary in consequence of a new Constitution promulgated at that time for the whole Ottoman Empire. The Conference held its last sitting on January 22, 1877, and broke up ineffectively. On March 1 the armistice expired, and a Treaty of Peace was concluded between Turkey and Servia, on terms favourable to the latter. Montenegro, however, maintained its state of hostility.

A Note, jointly signed by the six Great Powers on March 31, and known as the Protocol of London, was communicated to the Porte as a further attempt to achieve a pacific solution of the question, but without avail.

War was declared by Russia against Turkey on the 19th of the following April. The Proclamation set forth the "desire of the Czar to ameliorate and assure the lot of "the oppressed Christian population of Turkey;" and that "the Porte remained immovable in its categorical refusal of "any effective guarantee for the security of the Christians, "and to defer to the unanimous will of Christian Europe."

The other Powers declined to associate themselves with Russia in her resort to arms, and she entered upon the war with the assistance only of Roumania and Montenegro, and ultimately of Servia. The Turkish dominions both in Asia and Europe were invaded; success, after some fluctuations of fortune, attended the Russian arms, and the war was brought to an end by the Preliminary Treaty of San Stefano (March 3, 1878) (*x*). This Treaty, however, was largely modified by the Treaty concluded on July 13 in the same year at the Congress of Berlin (*y*).

The Great Powers had at last become alarmed at the success of Russia, and thought by this Treaty to readjust

(*x*) *Ante*, pp. 137-141.

(*y*) *Ante*, p. 89.



the Balance of Power disturbed by her victories over the Porte and by the territorial acquisitions, which appeared to be their natural consequence.

CCCCVII. The general subject of the Balance of Power should not be altogether dismissed without the remark that the maintenance of this doctrine does not require that all existing Powers should retain exactly their present territorial possessions, but rather that no single Power should be allowed to increase them in a manner which threatens the liberties of other States (*z*). The doctrine, properly understood, does not imply a pedantic adherence to the particular system of equilibrium maintained by existing arrangements, but it is opposed to such an alteration of the balance as tends to seriously disturb the relations of existing States (*a*).

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(*z*) *Bolingbroke's Works*, vol. ii. p. 439.

(*a*) "Sunt profecto eruntque semper hujus libræ lances impares: verum est politicorum curare ne aliqua ex parte nimium invergat discrimen. Quod ubi recte providetur, etsi eveniant rerum conversiones salva manet doctrina equilibrii, nomen ergo hoc sensu melius interpretaberis prout Ancillon, *System der Gegenkräfte und der Wechselwirkung*, quam cum aliis *System des Gleichgewichts*."—*Klinkhammer ubi supra*, p. 61.

Lord Bacon says: "Kings have to deal with their neighbours.—First, for their neighbours there can no general rule be given (the occasions are so variable), save one which ever holdeth: which is, that princes do keep due sentinel, that none of their neighbours do overgrow so (by increase of territory, by embracing of trade, by approaches, or the like) as they become more able to annoy them than they were; and this is generally the work of standing counsels to foresee and to hinder it. During that triumvirate of kings, King Henry VIII. of England, Francis I., King of France, and Charles V., Emperor, there was such a watch kept that none of the three could win a palm of ground, but the other two would straightways balance it, either by confederation, or, if need were, by a war; and would not in any wise take up peace at interest: and the like was done by that league (which Guicciardini saith was the security of Italy) made between Ferdinando, King of Naples, Florenzius Medicea, and Ludovicus Sforza, potentates, the one of Florence, the other of Milan. Neither is the opinion of some of the schoolmen to be received, that a war cannot justly be made but upon a precedent injury or provocation; for there is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war."—*Bacon, Essay on Empire*.

CCCCVIII. Another ground of Intervention (*b*) in the internal affairs of another kingdom has been asserted; namely, when the alterations and changes made in the constitution of that kingdom affect the Reversionary Rights of the Intervening Power; for instance, when a recognized feudal relation, or the contingent and eventual Right of Succession, secured by Treaty to the Intervening kingdom, is cut off by the alterations and changes so made (*c*).

In the year 1849, Austria is supposed to have meditated an Intervention in the affairs of Tuscany upon this ground (*d*).

By the Treaty of Vienna, in 1735, it was provided that the Duke of Lorraine should succeed to the last male heir of the Medici, the childless Gaston. This was a part of the negotiations by which Charles VI. sought to secure the undisputed recognition of Maria Theresa as successor to his dominions. The arrangement, guaranteed by almost all the European Powers, was as follows:—"Le Grand-Duché de Toscane, après la mort du présent possesseur, appartiendra à la maison de Lorraine, pour l'indemniser des Duchez qu'elle possède aujourd'huiy."

"Toutes les Puissances qui prendront part à la pacification, luy en garantiront la succession éventuelle" (*e*).

The "maison de Lorraine" was despoiled of its Tuscan possessions by the Treaty of Luneville in 1801; but they were restored to it by the Treaty of Vienna in 1815. By the 100th Article of the final Act of the Congress, it was provided that "*S. A. I. et R. l'Archiduc Ferdinand d'Autriche*

In 1848 M. Guizot, in the Chamber of Deputies, said: "Je crois comme M. Thiers, que la France doit avoir constamment l'œil ouvert sur l'équilibre qui s'établit, et qui se déplace de jour en jour en Europe entre les grands systèmes de gouvernement, entre les gouvernements absolus et les gouvernements constitutionnels. . . . Savez-vous ce qu'il y a de plus dangereux, de plus fatal pour le régime constitutionnel, pour ce côté du grand équilibre européen? Ce sont les tentatives infructueuses ou malheureuses."—*Guizot, Hist. parlementaire de France*, t. v. p. 558.

(*b*) *Hæffter*, pp. 92-95.

(*c*) *Martens*, p. 190, cases cited in note.

(*d*) See an article in the *Globe*, April 4, 1849.

(*e*) *Wenck. Jur. Gent.* t. i. p. 3.

“est rétabli, tant pour lui que pour ses héritiers et suc-  
 “cesseurs, dans tous les droits de souveraineté et propriété  
 “sur le Grand-Duché de Toscane et ses dépendances ainsi  
 “que S. A. I. les a possédés antérieurement au Traité de  
 “Luneville. Les stipulations de l'article 11 du Traité de  
 “Vienne du 3 octobre 1735, entre l'Empereur Charles VI  
 “et le Roi de France, auxquelles accédèrent, les autres  
 “Puissances, sont pleinement rétablies en faveur de S. A. I.  
 “et ses descendants ainsi que les garanties résultantes de  
 “ces stipulations” (f).

In this latter Treaty of Vienna the name of the reigning Grand Duke was substituted for that of his House, and the House, as distinguished from the issue of Ferdinand, was nowhere mentioned.

A presumption unfavourable to the claim of Austria arose from this marked difference in the language of the two Treaties; and the presumption was certainly much strengthened by the language of the 98th and 99th Articles of the Treaty of 1815 (g), which renewed and confirmed in express

(f) *Martens, Rec. de Tr. t. x. p. 424.*

(g) “Art. XCVIII.—S. A. R. l'Archiduc François d'Est, ses héritiers et successeurs, posséderont en toute propriété et souveraineté les duchés de Modène, de Reggio, et de Mirandole, dans la même étendue qu'ils étaient à l'époque du traité de Campo-Formio.

“S. A. R. l'Archiduchesse Marie Béatrix d'Est, ses héritiers et successeurs, posséderont en toute souveraineté et propriété le duché de Massa et la principauté de Carrara, ainsi que les fiefs impériaux dans la Lunigiana. Ces derniers pourront servir à des échanges ou autres arrangements de gré à gré avec S. A. I. le Grand-Duc de Toscane, selon la convenance réciproque.

“Les droits de succession et réversion établis dans les branches des archiducs d'Autriche, relativement aux duchés de Modène, de Reggio, et Mirandole, ainsi que des principautés de Massa et Carrara, sont conservés.

“Art. XCIX.—Sa Majesté l'Impératrice Marie-Louise possédera en toute propriété et souveraineté les duchés de Parme, de Plaisance, et de Guastalla, à l'exception des districts enclavés dans les Etats de S. M. I. et R. Apost. sur la rive gauche du Pô.

“La réversibilité de ces pays sera déterminée de commun accord entre les cours d'Autriche, de Russie, de France, d'Espagne, d'Angleterre, et de Prusse, toutefois ayant égard aux droits de réversion de la maison

terms the Rights of Reversion (*les droits de succession et réversion*) of Austria to the Duchies of Modena, Reggio, and Mirandola, and to the Principalities of Massa and Carrara, and the Rights of Reversion of Austria and Sardinia to the Duchies of Parma, Placentia, and Guastalla.

It may well have been foreseen, that the addition of Tuscany to Austria would cause a very material alteration in the Balance of Power, and would threaten the security of other States, while the absorption of the minor principalities into the kingdoms of Austria and Sardinia would produce no such effect.

It is evident that any question with respect to the Reversionary Rights of Foreign Princes over a State which has long occupied an independent position in the society of nations, may be fraught with the greatest difficulties both in speculation and practice (*h*).

Take the case of Tuscany for an example, on the supposition that the claim of Austria was well founded on the letter of the Treaty (*i*). Suppose that a State, having occupied for

d'Autriche et de S. M. le Roi de Sardaigne sur les dits pays."—*Martens, Rec. de Tr.* t. x. p. 423.

(*h*) "C'est incontestable qu'une nation change à son gré ses lois fondamentales."—*Mably*, t. ii. p. 138.

(*i*) "La nation peut, par la même raison, faire renoncer une branche qui s'établit ailleurs, une fille qui épouse un prince étranger. Ces renonciations, exigées ou approuvées par l'Etat, sont très-valides, puisqu'elles sont équivalentes à une loi que l'Etat ferait pour exclure ces mêmes personnes qui ont renoncé, et leur postérité. Ainsi la loi d'Angleterre a rejeté pour toujours tout héritier catholique romain. 'Ainsi la loi de Russie faite au commencement du règne d'ÉLISABETH, exclut-elle très-prudemment tout héritier qui posséderait une autre monarchie; ainsi la loi de Portugal rejette-t-elle tout étranger qui serait appelé à la couronne par le droit du sang.'—(*Esprit des Lois*, l. xxvi. c. xxiii., où l'on peut voir de très-bonnes raisons politiques de ces dispositions.) Des auteurs célèbres, très-savants d'ailleurs et très-judicieux, ont donc manqué les vrais principes en traitant des renonciations. Ils ont beaucoup parlé des droits des enfans nés ou à naître, de la transmission de ces droits, etc. Il fallait considérer la succession moins comme une propriété de la famille régnante que comme une loi de l'Etat. De ce principe lumineux et incontestable découle avec facilité toute la doctrine des renonciations. Celles que l'Etat a exigées ou approuvées sont valides et sacrées; ce sont des

a long period the position of a free and independent nation in the society of other States, thinks fit to secure its constitution, and to pass a fundamental law, similar to that by which Great Britain excluded James II. and his descendants from her throne, that no Prince of a certain race shall be henceforth their ruler; or a fundamental law, similar to that which was established by Russia in the reign of her Elizabeth, that the crown of their country shall never be worn by the Sovereign of another country; can it be denied that the exercise of such a power is inherent in the nature of an independent State? Third Powers, indeed, must recollect that the obligation of Treaties is as important a maxim of International Law as the free agency of independent States; but with respect to the nation herself, it remains certainly very difficult to reconcile her character of independence with the impossibility of exercising one of the most important attributes belonging to it.

It is to be hoped that the notion and the term of "Patrimonial States" are banished for ever from the theory and practice of International Law (*j*), and that the attempt will never again be made to give to the Sovereign of one independent State the Reversionary Right of succeeding to the throne of another.

CCCCIX. *Intervention on the ground of Religion* (*k*) is a question which has now assumed a character of paramount

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*lois fondamentales*: celles qui ne sont point autorisées par l'Etat ne peuvent être obligatoires que pour le prince qui les a faites; elles ne sauraient nuire à sa postérité; et lui-même peut en revenir, au cas que l'Etat ait besoin de lui et l'appelle, car il se doit à un peuple qui lui avait commis le soin de son salut. Par la même raison, le prince ne peut légitimement renoncer à contre-temps au dommage de l'Etat, et abandonner dans le danger une nation qui s'était remise entre ses mains."—*Vattel*, l. i. c. 5, s. 62.

(*j*) *Hottelck, Staats-Lexicon*, "Garantie" (vol. vi. p. 264), mentions the Bourbon family compact of 1761 as a proof of imperfect acquaintance with the true principles of International Law, inasmuch as by it the people were treated "*als das blosse Pertinenzstück des regierenden Hauses*."

See, too, *Ompheda*, vii. n. a.

(*k*) "*Communia altaria, æque ac patriam, diligite, colite, foveo.*"

importance, and, although already adverted to, requires some further consideration.

“ So familiar, and as it were so natural, to man is the practice of violence, that our indulgence allows the slightest provocation, the most disputable right, as a sufficient ground of national hostility. But the name and nature of a *holy war* demands a more vigorous scrutiny; nor can we hastily believe that the servants of the Prince of Peace would unsheath the sword of destruction, unless the motive were pure, the quarrel legitimate, and the necessity inevitable ” (l).

This opinion of the celebrated historian of Christian Constantinople—whatever may have been the spirit in which it was uttered—appears to rest upon a foundation of truth.

It was intended, we need not stop to inquire with what justice (m), to censure the earliest European invasion of the dominions of the Turk, the first religious war waged by Christian Princes against the disciples of Mohammed.

The Emperor of Russia maintained that the war in 1854 between Russia and the Porte was a Religious war (n).

If there be any truth in the doctrines laid down in the preceding pages of this work, there certainly are *principles of International Law* by which this position of Russia must be tried, and which are not perhaps either difficult to discover or hard to apply.

We have seen upon what principles other kinds of Inter-

(l) *Gibbon's Decline and Fall of the Roman Empire*, vol. ii. c. lx.

(m) *Fleury, Hist. ecclési.* t. xii. sixième Discours, 111: “ Je ne vois point que l'on ait mis alors en question si cette guerre étoit juste: tous les chrétiens d'Orient et d'Occident le supposoient également. Toutefois la différence de religion n'est pas une cause suffisante de guerre,” &c. “ Les princes chrétiens ont cru de tout tems être en droit de protéger les chrétiens étrangers opprimés par leurs souverains.” On this ground he says, Theodosius the younger refused to deliver up a Persian Christian to the King of Persia; and the Patriarch of Jerusalem sent through Peter the Hermit letters of entreaty for aid to Pope Urban.

(n) *Correspondence respecting the Rights and Privileges of the Latin and Greek Churches in Turkey*, presented to both Houses of Parliament by command of her Majesty, 1854.

vention have been justified. The question of Religious Intervention naturally divides itself into two parts:—

First, whether identity of religious faith with a certain number of the subjects of another State, whose rulers profess a different faith, has ever been holden, or ought in principle to be holden, as warranting the Intervention of a Foreign State on behalf of those subjects with whom it has the impalpable but stringent bond of a common religion. Secondly, if Intervention be justifiable on this ground, what kind of Intervention?—that of remonstrance, carried, if necessary, to the length of a refusal to maintain any intercourse with the oppressor of your brethren in the faith? or the *ultima ratio*, the commencement of actual hostilities against the State which denies your title to interfere with her jurisdiction over her citizens?

With respect to any right of Intervention on the ground of similarity of religious faith, there is, *in limine*, a distinction, perhaps not unimportant, to be taken. Intervention may be, and has been, claimed by one Christian State, in the affairs of another, on behalf of a particular body of Christians, professing a form of Christianity identical with that of the Intervening State, but different from that of the State of which they are subjects. Again, Intervention may be claimed in the affairs of an Infidel State on behalf either of Christians *generally*, or of a *particular* body of Christians. This latter kind of Intervention is that which was claimed in 1854, as in 1877, by Russia as to the jurisdiction of the Porte over the Christian subjects in her dominions—a species of Intervention which Russia, by virtue of her Protectorate of the Greek Church, had been *accustomed* to exercise, and which in 1854 she declared that she desired to exercise merely for the purpose of securing to the Greek Church rights conceded to her *ab antiquo* by the Porte.

CCCCX. It would seem that three propositions were, by implication, maintained in this claim, as preferred in 1854.

1. That the demand was sanctioned by the analogy derivable from the precedents of Christian Intervention in

other Christian States on behalf of particular bodies of Christians.

2. That the right of Christian Intervention on religious grounds in a Mohammedan State rests upon an obviously stronger foundation.

3. That the rights which the Russian Intervention were intended to secure were rights granted by the Porte, *ab antiquo*, to the Greek Church.

CCCCXI. As to the first of these propositions:—The practice (if it can be called such) of Intervention by one Christian State on behalf of the subjects of another Christian State upon the ground of religion, dates from the period of the Reformation. It could scarcely, indeed, have had an earlier origin. The abstract principle of this kind of Intervention has derived positive force from being embodied in various important Treaties.

The Treaties having for their object to secure the peaceable profession of religion are of two kinds—first, those which concern the exercise of religion (*devotio domestica*) of native subjects of the Intervening State commorant in a foreign land; secondly, those which concern the religion of foreigners not its subjects.

The great Treaty of Westphalia, in its general language respecting Germany, established, as a maxim of public law, that there should be an equality of rights between the Roman Catholic and Protestant religions; a maxim renewed and fortified by the Germanic Confederation of 1815. In these instances, it is true, the several States to which the stipulation related were all members of one Confederation, though individually independent of each other. But the precedent does not stop here; for, passing by the Interventions of Elizabeth, Cromwell, and even Charles II., on behalf of foreign Protestants, and going back no later than 1690, we find in that year Great Britain and Holland intervening in the affairs of Savoy, and obtaining from that kingdom a permission that a portion of the Sardinian subjects might freely exercise their religion (*o*).



In the negotiations which preceded the Treaty of Utrecht. (1713), our Queen Anne stipulated with France that, in return for the permission accorded to French subjects to sell their immovable property in the North American Colonies recently conquered by Great Britain, his Most Gracious Majesty should release from the galleys the French Protestants who had been confined there solely on account of their religion. Further than this, we learn from Lord Bolingbroke's letters (*p*), foreign interference could not be extended;—he suggests, indeed, that France might be tempted to retort, and require some mitigation of the heavy penalties under which the Irish Roman Catholic subjects of Queen Anne were then suffering.

Sweden interfered in 1707 on behalf of the Protestants of Poland.

The Treaties of Velau (*q*), 1657, of Oliva (*r*), 1660, of Nimeguen (*s*), 1679, of Ryswick (*t*), 1698, of Utrecht (*u*), 1713, of Breslau (*x*), 1742, may all be enumerated as instances of Roman Catholic Intervention on behalf of Roman Catholic subjects, in countries ceded to Protestant sovereigns—an Intervention which, it should be remembered, was almost invariably *invoked* by the inhabitants within the country.

It appears, therefore, that Intervention by one Christian State on behalf of the subjects of another upon the ground of Religion has, as a matter of fact, in certain circumstances, been practised, and cannot be said, in the abstract, to be a violation of International Law. But what kind of Intervention? By remonstrance, by stipulation, by a condition in a Treaty concluding a war waged upon other grounds.

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(*p*) *Bolingbroke's Letters*, vol. iv. pp. 121, 171-2, 450.

(*q*) Art. xvi.

(*r*) Art. ii.

(*s*) Art. ix.

(*t*) Art. iv.

(*u*) Art. xxiii.

(*x*) Art. vi.

It may, perhaps, be justly contended that the principle might be pushed further; and that in the event of a *persecution* of large bodies of men, on account of their religious belief, an armed Intervention on their behalf might be as warrantable by International Law, as an armed Intervention to prevent the shedding of blood and protracted internal hostilities.

It is, however, manifestly unsafe to contemplate these extreme cases of exception from the sound general rule of non-interference in the domestic legislation of Foreign States. The duty of such non-interference is clear; it should not be turned into a doubt. Therefore it is that no writer of authority upon International Law sanctions such an Intervention, except in the extreme case of a positive *persecution* inflicted avowedly upon the ground of religious belief. Vattel, himself a Protestant, was not at all disposed to underrate the right of Intervention of Foreign Powers on behalf of their co-religionists in other countries: his opinion, therefore, which is in accordance with that which has been here expressed, deserves the most respectful consideration (*y*).

It would be difficult to find any writer upon International Law who has ever expressed a different opinion; though not uncommonly they close their remarks on this subject by observing on the manner in which the exceptional use of Intervention upon religious grounds has been abused in practice.

Thus the accurate and careful Martens observes:

“Toutes les guerres auxquelles la religion a servi de motif ou de prétexte ont fait voir, 1° que jamais la religion n’a été le seul motif pour lequel les Puissances étrangères sont entrées en guerre; 2° que lorsque la politique s’accorde avec les intérêts de leur religion, elles ont effectivement soutenu la cause de celle-ci; 3° mais que tous les jours le zèle religieux a cédé aux motifs de politique;

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(*y*) “Du droit de sûreté, et des effets de la souveraineté et de l’indépendance des nations.”—*Vattel, Droit des Gens*, t. i. p. 311, ss. 57, 59, 62.

“4° et que plus d’une fois même celle-ci a entraîné à des démarches directement opposées aux intérêts de leur religion” (z).

So much for the doctrine of Intervention in matters of religion between Christian States.

CCCCXII. We now arrive at the consideration of the second proposition, which relates to Christian Intervention upon the same subject with Mohammedan States. The converse of this, viz., Mohammedan Intervention with Christian States, has, it is believed, never yet arisen in practice, but it would be subject on principle to the same law (a).

Is the rule of law altered by the fact that the persons in whose behalf the right of Intervention is claimed are the subjects of a Mohammedan or Infidel State?

The true answer seems to be that the rule is not changed, but that there is a much wider field for the application of the exceptional principle of interference.

For some time after the conquest of Constantinople (1453) grave doubts were entertained by the nations of Christendom as to the lawfulness of any pacific intercourse with the Sultan. It was not till after the Treaty of Constantinople in 1720 that the Russian Minister was permitted to *reside* at Constantinople; and direct relations between Roman Catholic Sovereigns and the Porte can scarcely be said to have an earlier date than the end of the eighteenth century (b). Even after the lapse of nearly four centuries, at the Congress of Vienna, 1815, the Ottoman Empire was not represented, nor was it included in the provisions of positive public law contained in the Treaty which was the result of the Congress. The admission of the representative of the Porte to the Congress which preceded the Treaty of Paris in 1856, and the

(z) *Martens, Précis du Droit des Gens*, t. i. p. 201.

(a) There is an article in the Treaty of Constantinople, between Russia and the Porte, in 1770, in which Russia stipulates that the Porte shall perform certain religious ceremonies on behalf of the Khan of Tartary.

(b) *Miltitz, Manuel des Consuls*, t. ii. p. 1571.

recognition of her new position in this respect, carrying with it the duties and rights arising from the Public Law of Europe, was a matter of solemn record in a Protocol of that Treaty (c).

CCCCXIII. With respect to the third proposition :

From the period of the permanent settlement of the Turk in Europe, all the Christian Powers have endeavoured to obtain, and have by degrees succeeded in obtaining, a criminal and civil jurisdiction over their *own subjects* in Turkey through the medium of Consuls. Moreover, Roman Catholic Powers have obtained certain privileges, both with respect to the access of their own subjects to the Holy Places of Palestine, and with respect to the Latin Church there. At first these privileges were granted to some favoured European Powers, and especially to France, under whose flag other Christian Powers sought protection (d). The Treaty recently referred to by French authorities, between Sultan Achmet and Henry IV. of France, concluded in 1604 (e), is the model Treaty, so to speak, upon this subject (f).

(c) Protocol 2.—“The fourth point is read throughout, and Count Walewski remarks thereupon that it will be proper to record the entrance of Turkey within the Public Law of Europe. The Plenipotentiaries agree that it is important to record this new fact by a special stipulation inserted in the general Treaty.” It was embodied in Art. vii. of the Treaty of Paris.

(d) In 1534, Francis I. made an alliance with the Sultan Soliman against Charles V., and from that time a close intercourse has subsisted between France and the Porte.

(e) *Schmauss*, t. i. p. 430.

(f) “Art. IV.—Que de Vénétiens en Anglois en là les Espagnols, Portugais, Cattelans, Ragusois, Gènevois, Anconitains, Florentins et généralement toutes autres nations quelles qu’elles soient, puissent librement venir trafiquer par nos Païs, sous l’aven et seureté de la Bannière de France, laquelle ils porteront comme leur sauve-garde, et de cette façon ils pourront aller et venir trafiquer par les lieux de notre Empire comme ils y sont venus d’Ancienneté, obéissant aux Consuls François qui résident et demeurent par nos Havres et Echelles; voulons et entendons qu’en usant ainsi ils puissent trafiquer avec leurs vaisseaux et gallions sans être inquiétés, et ce seulement tant que ledit Empereur de France conservera notre amitié et ne contreviendra à celle qu’il nous a promise.

To this Treaty succeeded one in 1673 ; but a later and more important Treaty was in 1740. It related to the two subjects: 1. The Holy places. 2. The general protection of the Christian Religion.

With respect to the Holy Places there are various specific provisions (g).

With respect to the general question of the Christian worship and religion, the provisions are as follow :

“ Les deux Ordres de Religieux François quisont à Galata, “ savoir les Jésuites et les Capucins, y ayant deux Eglises, “ qu’ils ont entre leurs mains *ab antiquo*, resteront encore “ entre leurs mains, et ils en auront la possession et jouis- “ sance: Et comme l’une de ces Eglises a été brûlée, elle “ sera rebâtie avec permission de la justice, et elle restera “ comme par ci-devant entre le mains des Capucins, sans “ qu’ils puissent être inquiétés à cet égard. On n’inquiétera “ pas non plus les Eglises que la Nation Française a à “ Smyrne, à Syde, à Alexandrie, et dans les autres à “ Echelles ; et l’on n’exigera d’eux aucun argent sous ce “ prétexte ” (h).

“ On n’inquiétera pas les François quand dans les bornes “ de leur Etat ; ils liront l’Evangile dans leur Hôpital de “ Galata ” (i).

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Voulons et commandons aussi que les sujets dudit Empereur de France, et ceux des Princes ses amis, Alliés, et Confédérés, puissent sous son aveu et protection venir librement visiter les Saints Lieux de Jérusalem, sans qu’il leur soit fait ou donné aucun empêchement. De plus pour l’honneur et amitié d’icelui Empereur nous voulons que les Religieux qui demeurent en Jérusalem et servent l’Eglise de Coumame (c’est-à-dire le saint sépulcre de Notre Seigneur Jésus-Christ) y puissent demeurer, aller et venir seurement et sans aucun trouble et detourbier, et y soient bien reçus, protégés, aidés et secourus en la considération susdite.”—Traité entre Henri IV., Roy de France, et le Sultan Achmet, de l’an 1604, *Schmauss*, t. i. p. 430.

(g) Capitulations ou Traités anciens et nouveaux, entre la Cour de France et la Porte ottomane, renouvelés et augmentés l’an de J.-C. 1740, et de l’Egire 1153, art. i. xxxii. xxxiii. xxxiv. lxxxii.—*Wenck. Cod. Jur. Gent.* t. i. p. 538.

(h) *Wenck. Cod. Jur. Gent.* t. i. p. 555: Capitulations, &c., Art. xxxv.

(i) *Ib.* Art. xxxvi. p. 556.

An unquestionable authority upon the nature and character of the French Protectorate in the East, appears to be furnished by the *Diplomatic Memoirs* of Monsieur de Saint-Priest. He was ambassador from the Court of France at Constantinople from 1768 to 1785; he describes the Protectorate exercised by the monarchs of France over the Roman Catholics of the Levant in these words:—

“On a décoré le zèle de nos Rois de l'expression de protection de la Religion Catholique en Levant; mais elle est *illusoire*, et sert à égarer ceux qui n'approfondissent pas la chose. Jamais les Sultans n'ont eu seulement l'idée que les Monarques François se crussent autorisés à s'immiscer de la Religion des sujets de la Porte.—Il n'y a point de Prince, dit fort sagement un de nos prédécesseurs, M. le Marquis de Bonnat, dans un Mémoire sur cette matière, quelque étroite union qu'il ait avec un autre Souverain, qui lui permette de se mêler de la Religion de ses sujets. Les Turcs sont aussi délicats que d'autres là-dessus.

“Il est aisé de comprendre que la France n'ayant jamais traité avec la Porte qu'à titre d'amitié, n'a pu lui imposer des obligations odieuses de leur nature. Aussi le premier point de mes instructions me prescrivait d'éviter tout ce qui pourroit causer de l'ombrage à la Porte en donnant trop d'extension aux capitulations en matière de la Religion” (j).

The true doctrine of International Law upon this subject could not be more fairly or more correctly expressed than in the important citation which has just been made. And it must be remembered, that no single Treaty can be pointed out between the Porte and France, any more than between the Porte and Russia, in which that doctrine has ever been, in the slightest degree, violated.

The Russian Protectorate of the Greek Church, which has

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(j) *Moniteur*, June 3, 1853.—*L'Univers*, June 4, 1853. It is also referred to by M. Drouyn de Lhuys in his second circular.

*Vide supra*, papers referred to, note (n), p. 619.

France has subsequently explained with distinctness that she only claims a protectorate over French Roman Catholic subjects.

been claimed, must be of comparatively recent date. It was not till about the year 1677 that the Russians and the Turks were brought into actual contact with each other. In 1854 Count Nesselrode referred to the Treaty of Kaynardgi (1774) as containing the record of the Right of Intervention now claimed by Russia, and also to the Treaty of Adrianople (1829) as confirmatory of the stipulations. Here, then, we have tangible, accessible references, and not shadowy allusions to undefined, unrecorded concessions. The earlier Treaty of Belgrade (1739) might have also been referred to. It is of great importance to study the *ipsissima verba* of these Treaties, and see whether their letter or their spirit sustained the Russian demand.

The eleventh article of the Treaty of Belgrade, concluded between the Empress Anne of Russia and the Sultan Mahmud (*k*), relates to the free access of Russia to the Holy Places. Austria concluded at Belgrade, at the same time, a Treaty containing similar provisions.

The Treaty of Kaynardgi (or Koutchouk-Kainardji), to which the Emperor of Russia has especially referred as the foundation of his claim, was concluded in the year 1774, between Russia and the Porte. The articles of it which refer to the present subject are here given at length.

ART. VII. (*l*)

“La Fulgida Porta promette una ferma protezione alla religione Christiana, e alle chiese di quella; permette ancora a' Ministri dell'

## ART. VII.

“La Sublime Porte promet de protéger constamment la religion chrétienne et ses églises; et aussi elle permet aux Ministres de la

(*k*) *Acta Pacis Belgradi inter Annam Russiæ Imperatricem et Sultanum Ottom. Mahmud. Traduction du Traité de Paix de Belgrade entre la Russie et la Porte, Art. xi.*

(*l*) Articoli della perpetua Pace tra l'Impero di tutte le Russie e la Porta Ottomanna, conchiusa nel campo presso la città di Chiuscuc Cainargi, distante 4 leghe della città di Silistria. *Traité de Paix perpétuelle et d'amitié entre l'Empire de Russie et la Porte ottomane, conclu le 10 juillet dans la tente du Commandant-en-chef le Feld-maréchal comte de Roumanzow, près du village de Kutschouc Kaynardgi, sur la rive droite du Danube.*—*Martens, Rec. de Tr. t. ii. (1771-1779), pp. 286-7.* See Debate in House of Commons and Mr. Gladstone's Speech, reported, March 24 and March 28, 1877.

Imperial Corte di Russia di fare in ogni occorrenza varie rappresentanze alla Porta a favore della sotto mentovata eretta chiesa in Constantinopoli, accennata nell' Art. XIV, non meno che di quei che la servono, e promette ricevere queste rimostranze con attenzione, come fatte da persona considerata d'una vicina e sinceramente amica Potenza."

#### ART. XIV.

"L'altissima Corte di Russia potrà a norma delle altre Potenze, a riserva della chiesa domestica, edificarne una nella parte di Galata nella strada detta Bey-Ugli, la qual chiesa sarà pubblica, chiamata Russo-Greca, e questa sempre si manterrà sotto la protezione del Ministro di questo Impero, e anderà illesa da ogni molestia ed oltraggio."

#### ART. VIII.

"Si permetterà liberamente a' sudditi dell' Impero Russo, tanto ecclesiastici quanto secolari, il visitare la S. Città di Gerusalemme, ed altri luoghi degni di esser visitati, e non si dimanderà mai da tali viandanti e viaggiatori, nè in Gerusalemme, nè in altri luoghi, nè anche nelle vie da chicchesia, nessun caraccio, taglia, o tributo, o qualche altra tassa. Ma oltre a ciò saranno muniti co' convenienti passaporti, o firmani, i quali si danno ai sudditi delle altre Potenze. E nel tempo ch' essi saranno nell' Impero Ottomanno, non si farà loro nessun torto, nè alcun oltraggio, ma saranno difesi con tutto il rigore delle leggi."

Cour Impériale de Russie de faire dans toutes les occasions des représentations, tant en faveur de la nouvelle église à Constantinople dont il sera mention à l'Article XIV, que pour ceux qui la desservent, promettant de les prendre en considération, comme faites par une personne de confiance d'une Puissance voisine et sincèrement amie" (m).

#### ART. XIV.

"A l'exemple des autres Puissances, on permet à la haute Cour de Russie, outre la chapelle bâtie dans la maison du Ministre, de construire dans un quartier de Galata, dans la rue nommée Bey-Oglu, une église publique du rit grec, laquelle sera toujours sous la protection des Ministres de cet Empire et à l'abri de toute gêne et de toute avanie" (n).

#### ART. VIII.

"Il sera libre et permis aux sujets de l'Empire de Russie, tant séculiers qu'ecclesiastiques, de visiter la sainte ville de Jérusalem et autres lieux dignes d'attention. Il ne sera exigé de ces pèlerins et voyageurs par qui que ce puisse être, ni à Jérusalem, ni ailleurs, ni sur la route, aucun charatsch, contribution, droit ou autre imposition; mais ils seront munis de passeports et firmans, tels qu'on en donne aux sujets des autres Puissances amies. Pendant leur séjour dans l'Empire ottoman, il ne leur sera fait le moindre tort ni offense, mais au contraire ils seront sous la protection la plus rigide des loix."

(m) *Martens, Rec. de Tr. t. ii. (1771-1779), pp. 296-7.*

(n) *Ib. pp. 300, 301.*



In 1854 the Treaty of Adrianople (1829) was referred to by Russia as confirming the rights conceded by this Treaty of Kaynardgi.

That Treaty contains no *new* provision whatever on the subject of religion. There are special provisions relating to Moldavia and Wallachia, both in the body of the Treaty and in an annexed Treaty; but the only religious stipulation is for the free enjoyment and exercise of their religion (*o*).

The substance of the provisions of the Treaties just cited, appears to be—

1. That Pilgrims, Ecclesiastics, and Travellers may visit, safely and untaxed, Jerusalem and the Holy Places.

2. That certain new Chapels may be built in a particular quarter of Constantinople—*à l'exemple des autres Puissances*—besides the Ambassadorial Chapel, then existing: there is similar provision in the French Treaty of 1740.

3. That the Sublime Porte, *not* the Emperor of Russia, shall continue to protect the “Christian Religion:”—the interference of *the Emperor* being, in the same clause, implicitly limited to the making representations in favour of a particular church and its clergy, to which the Porte, on the ground of friendship alone, engages to listen.

CCCCXIV. Not only the language of the Treaties which have been concluded on this subject between Russia and the Porte, must be considered—but also the absence both of such Treaties themselves, and the absence of such provisions in Treaties, when the circumstances might well seem to call for them. In other words, the demand of Russia must be negatively, as well as affirmatively, examined. Let the cases of Servia and of Greece be considered.

The *Christian* Servians, who had made common cause with Russia in her wars with the Porte, and had been included in the Treaty of Bucharest in 1812, applied in vain, though after suffering atrocious cruelties, to the Congress of

(*o*) Art. V.—“Elles jouiront du libre exercice de leur culte,” &c.

Vienna, even to mediate on their behalf, and yet in that Congress Russia was pre-eminently powerful.

The Intervention of the great Christian Powers, among whom was Russia, for the pacification of Greece (1826), was placed, as we have seen (*p*), with careful precision upon the necessity of putting an end to a contest which injured the commerce and disturbed the repose of Europe, and upon the request of the Greeks for the mediation of the European Powers. In that Treaty, no allusion to the Russian Protectorate of the Greek Church is to be found.

If these premises be correct, the conclusion seems inevitable; but it must be left to the impartial jurist or historian to decide whether the evidence, both negative and affirmative, was favourable to or conclusive against the demand of Russia; whether it had a foundation in *precedent*, or whether it was altogether *new*; whether, in fact, it was not a pretext for an invasion of the Turkish dominions with the intention of acquiring a portion of them, if not Constantinople itself. We have seen the grounds upon which the European allies of Turkey founded their right of intervention on her behalf. We must pass over the history of what is popularly called the Crimean War which ensued; and, confining ourselves to the question of intervention on behalf of subjects of a foreign Power, co-religionists of the intervening Power, we have to notice next in order the Memorandum (December 28, 1854) communicated by the Plenipotentiaries of Austria, France, and England to Prince Gortschakoff, the Russian Minister. The fourth article referred to these former Treaties between Russia and the Porte, and especially to the Treaty of Koutchouk-Kainardji, "the erroneous interpretation of" which had been the principal cause of the existing war;" and pointed out that Russia, in renouncing "the pretension" of covering by her official Protectorate the Christian "subjects of the Porte," would also renounce any privileges arising from these Treaties (*q*).

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(*p*) *Vide ante*, pp. 115 and 571.

(*q*) *De Martens*, t. xliv. p. 632.

In the Conference of Vienna (r), March 15, 1855, between the same Powers and Russia and Turkey, the first Protocol recited this fourth article as one of the four bases of the Conference. At the subsequent Congress of Paris (April 16, 1856), between the same Powers, Aali Pacha, the representative of the Porte, stated "that a new Hati-Sheriff had renewed the religious privileges granted to the non-Mussulman subjects of the Porte, had prescribed new reforms, that this Act had been published, and that the Sublime Porte, in proposing to communicate it to the Powers by means of an official note, would in that matter have complied with the requirements in regard to the fourth point" (s). The ninth article of the Treaty of Paris, March 30, 1856, between the same Powers, was as follows: "His Imperial Majesty the Sultan, having, in his constant solicitude for the welfare of his subjects, issued a firman which, while ameliorating their condition without distinction of religion or of race, records his generous intentions towards the Christian population of his Empire, and wishing to give a further proof of his sentiments in that respect, has resolved to communicate to the contracting parties the said firman emanating spontaneously from his sovereign will. The contracting Powers recognize the high value of this communication. It is clearly understood that it cannot in any case give to the said Powers the right to interfere, either collectively or separately, in the relations of his Majesty the Sultan with his subjects, nor in the internal administration of his Empire" (t).

CCCCXIV. The war, closed by the Treaty of Berlin, was waged by Russia avowedly for the protection of the

(r) *De Martens*, t. xliv. p. 635.

(s) Protocols of Conferences held at Paris relative to the general Treaty of Peace, presented to Parliament, 1856.—*Ann. Reg.* 1856, p. 311.

*De Martens*, t. xliv. p. 707. The firman referred to will be found (dated Feb. 18, 1856), *ib.* p. 508, and *Ann. Reg.* 1856, p. 337.

(t) *Treaty of Paris*, March 30, 1856.

• Christian, especially the Greek Christian subjects, of the Porte. The duty of protecting her co-religionists was her justification for active Intervention. The other European States confined themselves to a kind of passive Intervention; but in both cases an Intervention was resorted to, which would not have been resorted to in the case of any Christian State and its subjects.

Early in 1877 the plenary Conference, before referred to, of the great European Powers, at Constantinople, had failed to obtain from Turkey adequate guarantees for the better government of her Christian subjects. In the English Parliament the refusal of the Porte was pronounced (*u*) to be "a mystery" and "an infatuation." The Conference broke up. Russia soon afterwards issued a circular note in which she said that "any thought of harbouring exclusive" or personal ideas was repudiated by all the Cabinets, and "the difficulty was thus reduced to bringing the Turkish Government to rule the Christian subjects of the Sultan "in a just and humane manner" (*x*).

On November 13, 1876, the Emperor Alexander, addressing a body of nobles and others at Moscow, said, "I know "that all Russia most warmly sympathizes with me in the "sufferings of our brethren and co-religionists."

On March 31, 1877, the Great Powers put forth a Protocol, speaking of maintaining "the agreement so happily "established between them," and of "jointly affirming "afresh the common interest which they take in the improvement of the condition of the Christian population of "Turkey" (*y*).

In the same sense, though Russia now speaks more emphatically on behalf of the Greek Church, is the following extract from a Protocol (No. 3.) preceding the Treaty of Berlin:—

"Prince Gortchacow observes that he is conforming him-

(*u*) By Lord Salisbury.

(*x*) *Ann. Reg.* 1877, p. 179.

(*y*) *Ib.* p. 181.

“self to the desire of the Congress in bringing written observations, and he reads the following document:—

“The Marquis of Salisbury has presented an elaborate proposal, having for its object the admission of Greece to take part in the Congress, or at least to be present at the sittings, at which questions connected with the interests of the Greek race shall be discussed.

“The Plenipotentiaries of Russia, on their side, think it right to set forth, in a similar declaration, the views of their Government on this subject :

“1st. Russia has always had in view in Turkey the interests of the Christians without regard to race. Her whole history has sufficiently proved this. With the Hellenic race she has a powerful bond of union, that of having received from the Eastern Church the religion of Christ. If, in the present war, Russia has been forced to take up more especially the defence of the Bulgarians, this is due to the fact that Bulgaria has, owing to circumstances, been the principal cause and the scene of the war. But Russia has always contemplated extending, as far as possible, to the Greek provinces, the advantages which she might succeed in winning for Bulgaria. She is gratified to see, by the proposals of the Plenipotentiaries of Great Britain and of France, that Europe shares these views, and she congratulates herself upon the solicitude which the Powers evince in favour of the populations of the Greek race, and the more so as she is convinced that this solicitude will equally extend to the populations of the Bulgarian race. The Imperial Government of Russia will consequently willingly adhere to any proposition which may be laid before the Congress in favour of Epirus, of Thessaly, and of Crete, whatever may be the extent which the Powers may desire to give to the advantages which may be reserved for them.

“2nd. The Imperial Government of Russia does not recognize any well-founded reason for the antagonism of

“ races which has been pointed out, and which cannot have  
 “ its origin in religious differences. All the nationalities  
 “ belonging to the Eastern Church have successively claimed  
 “ the right of having their autocephalous Church, that is to  
 “ say, their independent ecclesiastical hierarchy, and their  
 “ national tongue for public worship and schools. Such  
 “ has been the case in Russia, Roumania, Servia, and even  
 “ in the Kingdom of Greece. There is no sign that this  
 “ has led either to the rupture of the bonds which unite  
 “ these independent Churches with the Œcumenical Patri-  
 “ archate of Constantinople, or to any antagonism whatso-  
 “ ever between the races. The Bulgarians do not ask more  
 “ than this, and their rights to it are absolutely the same.  
 “ The cause of the differences of opinion and of the casual  
 “ disputes which have occurred is, therefore, to be sought in  
 “ certain private influences and intrigues, which would  
 “ appear to be neither consonant with the real interests of  
 “ the races, the tranquillity of the East, nor the peace of  
 “ Europe, and which, therefore, ought not to be encou-  
 “ raged ” (z).

CCCCXIVB. This claim to intervene in the dominions of the Sultan for the protection of his Christian subjects does in fact demonstrate that no plausible phrase, no verbal recognition of the Porte as a member of the European system, with the privileges and duties of an independent State, can veil the fact that she is by reason of the religious difference between the followers of Christ and of Mahomet, placed in an anomalous and inferior condition to that of other European States, and subjected with respect to this right of Intervention to exceptional rules of international treatment.

CCCCXV. The peculiar International status of the Papacy, which formerly combined the position of a temporal

(z) Correspondence relating to Berlin Treaty, June 19, 1878.—*Papers before Parl.* p. 34.

Sovereign with that of a spiritual Patriarch of the Western Church, has been adverted to, and is largely discussed in the second volume of these Commentaries.

The Intervention of Foreign States in the Papal dominions has generally been founded on the application or permission of the Pope—a remark which seems to take this occurrence out of the question now under discussion—namely, the Intervention of Foreign Powers to protect co-religionists, the subjects of another State, contrary to the wish, or without the permission of the Government of that State. But it must be observed that the grounds upon which France has defended the occupation (*a*), by her soldiers, of the Pontifical States, would go far to warrant Russia in protecting, by an armed force in the dominions of the Porte, the Patriarch of Constantinople.

In November 1866, Baron Ricasoli issued a circular to the Italian prefects, in which he said:—"The Roman question still remains to be solved; but after the fulfilment of the September Convention, that question cannot, and must not, be the motive for agitation. The sovereignty of the Pope is placed, by the September Convention, in the position of all other sovereignties (*b*). Italy has promised France and Europe to remain neutral between the Pope and the Romans, and to allow this last experiment to be tried of the vitality of an ecclesiastical principality without parallel in the civilized world. Italy must keep her promise, and await the certain triumph of her rights through the efficacy of the principle of nationality" (*c*).

The events which have since happened at Rome are the natural fruit of this policy.

CCCCXV. I cannot better conclude these observations

(*a*) Emperor Napoleon's Speech to the Chambers, March 1, 1860.-*Ann. Reg.* p. 215.

(*b*) *Ann. Reg.* 1864, p. 242.

(*c*) *Ann. Reg.* 1866, p. 262.

upon the general subject of Intervention than by referring to the opinion of Sir James Mackintosh, alike admirable for its wisdom and the eloquence in which it is clothed.

"It is not true," he says, "that every war which is disinterested and generous, which is waged against persecution or tyranny, is therefore forbidden by International Law. Though it is dangerous to allow too much latitude where virtuous motives may be used as pretexts, yet it is also certain that every nation which supinely contemplates flagrant wrong weakens its own spirit, as well as lessens its own reputation. A just and brave people may be wrongfully deprived of the confidence and esteem of other nations, but not of the efficacy of remembrances, assuring the world that they who have already fought for justice in the cause of others, may contend more for right than interest in their own. If it is good for an individual to be disinterested, to help the miserable, to defend the oppressed, these virtues must equally contribute to the well-being, honour, and safety of communities.

"The European law of nations is well adapted to a body of States of the same general character, and professing reverence for like principles of justice. In the ordinary wars of such States, its rules are of sacred authority. In relations, however, with communities of a different character, and on occasions too new and important to be embraced by precedent, while its principles retain their inviolability, its rules must sometimes yield.

"It seems morally evident that, whatever a nation may lawfully defend for itself, it may also defend for another, if called upon to interpose. It is true that ambition often converts these principles into pretexts; but ambition deals in the same manner with all the purest motives of human conduct. Our blame is not in such cases to be lessened; but it is to be applied, not to the principle avowed, but to the hypocrisy and fraud practised under colour of it. Much doubt has been thrown on these questions by



“ the general condemnation of religious wars. This phrase  
“ is equivocal. Wars to impose religion by force are  
“ the most execrable violation of the rights of mankind;  
“ wars to defend it are the most sacred exercise of these  
“ rights ” (*d*).

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(*d*) *Mackintosh's History of England*, c. iv. p. 127.

# APPENDIX.



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# APPENDIX.

## APPENDIX I. PAGE 14.

### SOURCES OF INTERNATIONAL LAW.

(*Extract from Suarez, De Legibus et Deo Legislatore*, lib. ii. c. xxix. n. 9.)

HAVING distinguished *jus gentium* from *jus naturæ*, he proceeds to say of the former : " Ratio hujus juris est, quia humanum genus, quamvis in varios populos et regna divisum, semper habeat aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale præceptum mutui amoris et misericordiæ, quod ad omnes extenditur, etiam extraneos et cujuscunque nationis. Quapropter licet unaquæque civitas perfecta, respublica aut regnum sit in se communitas perfecta, et suis membris constans ; nihilo minus quælibet illarum est etiam membrum aliquo modo hujus universi, prout genus humanum spectat. Nunquam enim illæ communitates adeo sunt sibi sufficientes sigillatim, quin indigeant aliquo mutuo juvamine et societate ac communicatione, interdum ad melius esse majoremque utilitatem, interdum vero et ob moralem necessitatem. Hac ergo ratione indigent aliquo jure, quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magna ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediate quoad omnia ; ideoque specialia jura potuerunt usu earundem gentium introduci."

(*Extract from the Traité des Loix by Domat*, chap. xi. s. 39.)

" Comme tout le genre humain compose une société universelle, divisée en diverses nations, qui ont leurs gouvernemens séparés, et que les nations ont entr'elles de différentes communications, il a été nécessaire qu'il y eût des loix qui réglassent l'ordre de ces communications, et pour les princes entr'eux et pour leurs sujets, ce qui renferme l'usage des ambassades, des négociations, des

“ Traités de Paix, et toutes les manières dont les princes et leurs  
 “ sujets entretiennent les commerces et les autres liaisons avec leurs  
 “ voisins. Et dans les guerres même il y a des loix qui règlent les  
 “ manières de déclarer la guerre, qui modèrent les actes d’hostilité,  
 “ qui maintiennent l’usage des médiations, des trêves, des suspen-  
 “ sions d’armes, des compositions, de la sûreté des ôtages, et d’autres  
 “ semblables.

“ Toutes ces choses n’ont pu être réglées que par quelques loix ;  
 “ et comme les nations n’ont aucune autorité pour s’en imposer les  
 “ unes aux autres, il y a deux sortes de loix, qui leur servent de  
 “ règles. L’une des loix naturelles de l’humanité, de l’hospitalité, de  
 “ la fidélité, et toutes celles qui dépendent de ces premières, et qui  
 “ règlent les manières dont les peuples de différentes nations doivent  
 “ user entr’eux en paix et en guerre. Et l’autre est celle des règle-  
 “ mens dont les nations conviennent par des Traités, ou par des  
 “ usages, qu’elles établissent et qu’elles observent réciproquement.  
 “ Et les infractions de ces loix, de ces traités, et de ces usages sont  
 “ réprimées par des guerres ouvertes, et par des représailles, et par  
 “ d’autres voyes proportionnées aux ruptures et aux entreprises.

“ Ce sont ces loix communes entre les nations qu’on peut appeler  
 “ et que nous appelons communément le droit des gens ; quoique ce  
 “ mot soit pris en un autre sens dans le droit romain, où l’on com-  
 “ prend sous le droit des gens les contrats même ; comme les ventes,  
 “ les louages, la société, le dépôt, et autres, par cette raison qu’ils  
 “ sont en usage dans toutes les nations.”

(*Extract from Merlin, Répertoire de Jurisprudence, vol. v. p. 291.*)

“ Le droit *primitif* des gens est aussi ancien que les hommes, et il  
 “ est par essence aussi invariable que le droit naturel ; les devoirs  
 “ des enfans envers leurs pères et leurs mères, l’attachement des  
 “ citoyens pour leur patrie, la bonne foi dans les conventions, n’ont  
 “ jamais dû souffrir aucun changement ; et ces devoirs, s’ils n’ont pas  
 “ été toujours remplis, ont toujours dû l’être.

“ Quant au droit des gens *secondaire*, il s’est formé, comme on l’a  
 “ déjà dit, par succession de temps. Ainsi, les devoirs réciproques  
 “ des citoyens ont commencé lorsque les hommes ont bâti des villes  
 “ pour vivre en société ; les devoirs des sujets envers l’État ont com-  
 “ mencé lorsque les hommes de chaque pays, qui ne composaient  
 “ entre eux qu’une même famille soumise au seul gouvernement  
 “ paternel, ont établi au-dessus d’eux une puissance publique qu’ils  
 “ ont déléguée à un ou à plusieurs d’entre eux.

“ L’ambition, l’intérêt, et les autres sujets de discorde entre les  
 “ puissances voisines, ont donné lieu aux guerres et aux servitudes  
 “ personnelles ; telles sont les sources funestes d’une partie de ce  
 “ second droit des gens.

“ Les différentes nations, quoique la plupart divisées d’intérêts,  
 “ sont convenues entre elles tacitement d’observer, tant en paix

"qu'en guerre, certaines règles de bienséance, d'humanité et de justice, comme de ne point attenter à la personne des ambassadeurs ou autres personnes envoyées pour faire des propositions de paix ou de trêve; de ne point empoisonner les fontaines; de respecter les temples; d'épargner les femmes, les vieillards, et les enfans; ces usages et plusieurs autres semblables, qui par succession des temps ont acquis force de loi, ont formé ce qu'on appelle le droit des gens ou le droit commun aux divers peuples."

(Extract from Vattel, *Prélim. s. 6.*)

"Il faut donc appliquer aux nations les règles du droit naturel, pour découvrir quelles sont leurs obligations, et quels sont leurs droits; par conséquent le droit des gens n'est originairement autre chose que le droit de la nature appliqué aux nations. Mais comme l'application d'une règle ne peut être juste et raisonnable, si elle ne se fait d'une manière convenable au sujet, il ne faut pas croire que le droit des gens soit précisément et partout le même que le droit naturel, aux sujets près, en sorte que l'on n'ait qu'à substituer les nations aux particuliers. Une société civile, un Etat, est un sujet bien différent d'un individu humain; d'où résultent, en vertu des lois naturelles même, des obligations et des droits bien différentes en beaucoup de cas; la même règle générale, appliquée à deux sujets, ne pouvant opérer des décisions semblables, quand les sujets diffèrent; ou une règle particulière, très-juste pour un sujet, n'étant point applicable à un second sujet de toute autre nature. Il est donc bien des cas, dans lesquels la loi naturelle ne décide point d'Etat à Etat, comme elle déciderait de particulier à particulier. Il faut savoir en faire une application accommodée aux sujets; et c'est l'art de l'appliquer ainsi, avec une justesse fondée sur la droite raison, qui fait du droit des gens une science particulière."

## APPENDIX II. PAGE 32.

### INTERNATIONAL JURISPRUDENCE OF ANCIENT ROME.

I. GROTIUS is literally inaccurate, as Ompteda remarks, in citing Cicero for a direct assertion that the science of International Jurisprudence was, in the abstract, an excellent thing. But unquestionably, in the passage upon which Grotius relies for this assertion, International Jurisprudence is recognised as a science, and acquaintance with it as the accomplishment of a statesman. Cicero (a), speaking of Pompey, says that he possessed "*præstabilem scientiam*

(a) *Orat. pro Lege Manil.*



"in fœderibus, pactionibus, conditionibus populorum, regum exterarum nationum in universo denique belli jure et pacis," and it would not be easy to give a juster, better, more complete recognition, or a fuller description of the science of which we are treating. In Sallust, the expression *jus gentium* is certainly to be found used in the sense of International Law, and also in some passages of Livy. For instance, when Sallust tells us that Marius, in putting to death the Numidians who had surrendered (*in deditionem acceptos*), acted *contra jus belli*, he speaks of it as a violation of a recognized rule of International Law, applicable now, as then, to a state of war. And Bocchus is made by the same author to claim the part of Numidia conquered from Jugurtha as "*jure belli suam factam*." Again Jugurtha maintains that the Senate had no right to prevent him from attacking Adherbal, who had attempted his (Jugurtha's) life. "Populum Romanum neque recte, neque pro bono facturum, si ab *jure gentium* sese prohiberit" (b). In the most barbarous times, ambassadors are said to be "*jus gentium sancti*" (c). In both these instances the meaning would be correctly rendered by the words Law of Nations. There is another passage in the "*Bellum Jugurthinum*" in which the Law of Nations, with respect to the privilege of the ambassador's suite, is clearly distinguished from the Law of Nature: "Fit reus magis ex æquo bonoque, quam ex *jure gentium* Bonilcar, comes ejus qui Romam fide publica venerat." The expression of Lucan, as to the violation of the Laws of Embassy by the Egyptians is very strong:

"Sed neque jus mundi valuit, neque fœdera sancta  
Gentibus."—*Lib. x.* 471–472.

With respect to the use of this expression, *jus gentium*, in the compilations of Justinian, it appears generally to be used to signify, sometimes what is called in modern times the Law of Nature, sometimes a positive Law universally instituted by all civilised nations. So, in the Digest (d), *acceptilatio*, or the release of a debt, is said to be *juris gentium*; and in modern times English Judges have said that questions relating to marriage are *juris gentium*.

Gaius and other Roman jurists made a twofold partition of *Jus*: into 1. *Jus Gentium vel Naturæ*; 2. *Jus Civile*. Ulpian and others made a threefold partition: 1. *Jus Gentium*; 2. *Jus Civile*; 3. *Jus Naturale*—meaning by this to include the interests common both to man and beast. Savigny rightly rejects this last partition, and adheres to the first (e).

There are, however, passages in which *jus gentium* clearly does

(b) *Sall. Bell. Jugurth.* 225.

(c) *Liv.* xxxix. 25.

(d) *Lib.* xlv. t. iv.

(e) *System des R. R.* i. (Beylage I.). See, too, *Cic. de Off.* l. i. 3–5.

mean International Law. Thus in the Digest, we read: "Si quis legatum hostium pulsasset, contra jus gentium id commissum esse existimatur, quia sancti habentur legati. Et ideo, quum legati apud nos essent gentis alicujus, quum bellum eis indictum sit, responsum est, liberos eos manere; id enim juri gentium conveniens esse. Itaque eum, qui legatum pulsasset, Quintus Mucius dedi hostibus, quorum erant legati, solitus est respondero; quoniam hostes si non recepissent, quæsitum est, an civis Romanus maneret, quibusdam existimantibus manere, aliis contra, quia quoniam semel populus jussisset dedi, ex civitate expulsi videretur, sicut faceret, quum aqua et igne interdiceret. In qua sententia videtur Publius Mucius fuisse. Id autem maxime quæsitum est in Hostilio Mancino, quem Numantini sibi deditum non acceperunt, de quo tamen lex postea lata est, ut esset civis Romanus, et Præturam quoque gessisse dicitur" (f).

In the Institutes it is said: "Sed naturalia quidem jura, quæ apud omnes gentes peræque servantur, divina quadam providentia constituta, semper firma atque immutabilia permanent; ea vero quæ ipsa sibi quæque civitas semper constituit, sæpe mutari solent, vel tacito consensu populi, vel alia lego postea lata" (g).

Here *jus gentium* and *jus naturale*, as the Law of Nature, are clearly synonymous. But in Gaius we find this remarkable passage: after having said that only Roman citizens were competent to enter into a contract in the form *spondes? spondeo*, he continues: "Unde dicitur, uno casu hoc verbo peregrinum quoque obligari posse, velut si Imperator noster Principem alicujus peregrini populi de pace ita interroget, Pacem futuram spondes? vel ipse eodem modo interrogetur. Quod nimium subtiliter dictum est; quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed jure belli res vindicatur" (h).

The reader who is anxious to prosecute his inquiries further into this not uninteresting subject would do well to consult the following among other treatises:

1. Warnkönig, "Vorschule der Institutionen und Pandekten," 83.

2. Savigny, "System des Römischen Rechts," i. 112; and Beylage I. to that volume.

II.—1. Observations upon the "Collegium Fecialium" and the "Jus Feciale." 2. The institution of the "Recuperatores," and the doctrine of the "Recuperatio."

1. Varro gives the following definition of the term: "Feciales, quod fidei publicæ inter populos præerant; nam per hos fiebat ut

(f) *Dig. lib. l. t. vii. s. 17.*

(g) *Inst. de Jur. Nat. Gent. et Civ. l. i. t. ii. s. 11.*

(h) The passage is cited by Savigny, *System des R. R.*, vol. iii. (note c), p. 310.

"justum conciperetur bellum, et inde desitum ut fœdere fides pacis  
 "constitueretur. Ex his mittebantur antequam conciperetur, qui  
 "res repeterent, et per hos etiam nunc fit fœdus, quod *fidus* Ennius  
 "scribit dictum" (i).

The Roman institution of the *Feciales* was perhaps derived originally from the Egyptians, though directly from the Greeks through the medium of their colonies settled in Italy; but it is a memorable characteristic of the Romans, that the founding of an institution having for its object the establishment and maintenance of fixed relations both in war and peace with neighbouring States, should have been almost cœval with the origin of their empire. The *Feciales*, occupying a middle station between priests and ministers of state, regulated, with as much precision as the heralds of the middle ages, and according to a certain ritual, the forms and usages relating to the treatment of ambassadors, the concluding of treaties, the promulgation and conduct of war (j). In these, as in all important concerns, the sanctions of religion were invoked to strengthen the obligations of morality. Cicero says: "*Belli quidem æquitas sanctissime feciali populi jure præscripta est*" (k); and the facts recorded in history appear to warrant this description. If a dispute arose between Rome and another independent State, *Feciales* were sent to demand reparation. If the attempt failed, war was declared according to minute and particular formalities.

It is not within the scope of this work to show how the decay and decline of this remarkable institution accompanied the corruption and overthrow of the Republic (l).

2. We know from other sources, besides the certain testimony of etymology, that in the very earliest ages both of Greece and Rome the stranger and the enemy were synonymous terms (*ἔχθρος*, *hostis*) (m). To the necessity which dawning civilization soon produced, of maintaining a friendly intercourse with the inhabitants of neighbouring States, as well as to some peculiarities in the condition of the founders of Rome, we owe the institution of the *Recuperatores*, and the doctrine of the *Recuperatio* (n).

For in order to satisfy this necessity, treaties were entered upon, in which the administration of justice to the individual subjects of the contracting parties within the dominions of either was mutually guaranteed. Therefore Grotius correctly observes: "*Tenetur (i. e. rex aut populus) etiam dare operam ut damna resarciantur: quod officium Romæ erat recuperatorum*. Gallus "*Ælius apud Festum, Recuperatio cum inter est populum et reges*

(i) Varro, *De Lingua Latina*, l. v. s. 80, p. 34 (Leipsic, 1833).

(j) Sell, pp. 23-74.

Grotius, *de J. B. et P.* l. ii. c. i. s. 22, p. 108.

(k) Cic. *de Off.* l. i.

(l) *Ompheda, Völkerrechts*, s. 34, p. 146.

(m) Sell, pp. 2-3, and notes.

(n) *Ib.* 330.

"nationesque ac civitates peregrinas lex convenit quomodo per  
"reciperatorem reddantur res reciperenturque resque privatas inter  
"se prosequantur."

Sell, to whose very learned work I have already referred, cites the passage from Festus, but makes no mention of Grotius—at least, I can find none.

The *Recuperatores* (*o*) were judges chosen for the purpose of deciding questions at issue between the native and the alien ally. Such a treaty, indeed, implied that the parties to it were free and independent States. For as soon as the one became actually subject to the other, the existence of such a treaty was useless, as the conquered might, and generally was compelled to, adopt the laws of the conqueror. Equally useless would such a treaty be in the case of two nations subsisting in so intimate an union as to be, as it were, citizens of one State. And if we bear in mind that in either of these contingencies a *Recuperatio* could have no place, and remember how rapidly the march of the Roman empire reduced foreign countries within one or other of them, we shall not be surprised that the traces of the proper and primary application of this peculiar branch of jurisprudence become fainter as we advance in the history of Rome, and at last disappear altogether from her records (*p*).

But when the *Recuperatio* was no longer strictly applicable, according to the letter of its original institution, because the subject, namely, *two* independent States, was wanting, the principle of this jurisprudence was transferred, by the practical wisdom of Rome, to the arbitration of disputes arising between Romans and the inhabitants of their colonies, and also of the provinces which it pleased them to leave with the appearances of independent States. Livy records a very striking instance of its application, at the request of the *legate* from Spain to the Senate of Rome.

"Hispaniæ deinde utriusque legati aliquot populorum in senatum  
"introduci. Ii, de magistratuum Romanorum avaritia superbia-  
"que conquesti, nisi genibus ab senatu petierunt, ne se socios  
"fœdus spoliari vexarique, quam hostes, patiantur. Quum et alia  
"indigna quererentur, manifestum autem esset pecunias captas,  
"L. Canuleio prætori, qui Hispaniam sortitus erat, negotium  
"datum est, ut in singulos a quibus Hispani pecunias peterent,  
"quinos *recuperatores* ex ordine senatorio daret, patronosque quos  
"vellent, sumendi potestatem faceret. Vocatis in curiam legatis  
"recitatum est senatûs consultum, jussique nominare patronos:  
"quatuor nominaverunt, M. Porcium Catonem, P. Cornelium Cn.  
"F. Scipionem, L. Æmilium L. F. Paullum, C. Sulpicium Gallum.  
"Cum M. Titinio primum, qui prætor A. Manlio, M. Junio con-

(*o*) "O rem præclaram vobisque ab hoc retinendam recuperatores,"  
&c.—Cic. *Orat. pro Cæcina*, ss. 22, 24–25.

(*p*) Sell, pp. 339–40.

"sulibus, in citeriore Hispania fuerat, recuperatores sumserunt. "Bis ampliatus, tertio absolutus est reus. . . . Ad *recuperatores* "adducti a citerioribus populis P. Furius Philus, ab ulterioribus "M. Matienus. Ille, Sp. Postumio, Q. Mucio consulibus, triennio "ante, hic biennio prius, L. Postumio, M. Popillio consulibus, "prætor fuerat. Gravissimis criminibus accusati ambo ampliati-  
"que : quum dicenda de integro caussa esset, excusati exsilii caussa  
"solum vertisse" (q).

While the *Recuperatio* existed in its primitive state, it presented a perfect picture of international arbitration upon the claims of *individuals* the subjects of different States, that is, upon questions of Private International Law. The better opinion seems to be, that it took no cognizance directly of questions of Public International Law, which belonged to the province of the *Feciales*.

The reader is referred to the following works for fuller information on this subject :—

1. Alexandri ab Alexandro Geniales Dies, vol. ii. l. v. c. 3,  
"Quonam modo per *Feciales* inirentur fœdera, aut bella indicerentur,  
"et quid ab exteris servatum est," ed. *Lugd. Bat.* 1673.
2. Sell, *Die Recuperatio der Römer*, ed. *Braunschweig*, 1837 (r).

### APPENDIX III. PAGE 45.

(*Extract from the Speech of Lord Grenville upon the Motion for an Address to the Crown approving of the Convention with Russia in 1801, as to the effect of embodying a Principle of General Law in a Treaty.*)

"BUT, among the numerous instances in which such a revival of the  
"present Treaty appears to be essential to the public interests, there  
"is none of such extensive importance as that to which I must next  
"entreat the particular attention of the House.

"On comparing together the different sections of the third article  
"of this convention, one great distinction between them cannot fail to  
"be remarked, even by the most superficial observer. The two first  
"sections and the fifth, those which relate to the coasting and colonial  
"trade, and to the proceedings of our maritime tribunals, are in

(q) *Liv. xliii.* 2. *Sell*, pp. 365-6.

(r) "Dass die in Privatsachen richtenden *Recuperatores* jemals in irgend einer rein öffentlichen Sache entschieden hätten, gleichviel ob die betreffenden Staaten unabhängig, einem Bunde angehörig, oder einem dritten untergeben waren, lässt sich durch keine Zeugnisse der alten belegen; wohl aber sind dergleichen aufzufinden, aus deren das Gegen-  
theil hervorgeht."—*Sell*, p. 57. See, too, p. 84.

“their frame and operation manifestly prospective. They provide  
 “only for the future arrangement of the objects which they embrace;  
 “and they profess to extend no further than to the reciprocal con-  
 “duct of Great Britain and Russia towards each other.

“The third and fourth sections, on the contrary, those which  
 “treat of contraband of war and of blockaded ports, do each of them  
 “expressly contain, not the concession of any special privilege  
 “henceforth to be enjoyed by the contracting parties only, but the  
 “recognition of a universal and pre-existing right, which, as such,  
 “cannot justly be refused to any other independent State.

“This third section, which relates to contraband of war, is in all  
 “its parts strictly declaratory. It is introduced by a separate  
 “preamble, announcing that its object is to prevent ‘all ambiguity  
 “or misunderstanding as to what *ought to be considered* as contra-  
 “band of war.’

“Conformably with this intention, the contracting parties declare  
 “in the body of the clause what are the only commodities which  
 “they ‘*acknowledge as such.*’ And this declaration is followed by  
 “a special reserve, that it ‘shall not prejudice their particular  
 “Treaties with other Powers.’

“If the parties had intended to treat of this question only as it  
 “related to their own conduct towards each other, and to leave it  
 “in that respect on the same footing on which it stood before the  
 “formation of the hostile league of 1800, all mention of contraband  
 “in this part of the present convention would evidently have been  
 “superfluous; nothing more could in that case be necessary than  
 “simply to renew the former treaties, which had specified what  
 “articles of commerce the subjects of the respective Powers might  
 “carry to the enemies of each other; and, as we find that renewal  
 “expressly stipulated in another article of this same convention, we  
 “must, in common justice to its authors, consider this third section  
 “as introduced for some distinct and separate purpose. It must,  
 “therefore, unquestionably be understood in that larger sense which  
 “is announced in its preamble, and which is expressed in the words  
 “of the declaration which it contains. It must be taken as laying  
 “down a general rule for all our future discussions with any Power  
 “whatever, on the subject of military or naval stores, and as esta-  
 “blishing a principle of law which is to decide universally on the  
 “just interpretation of this technical term of contraband of war.

“Nor, indeed, does it less plainly appear from the conclusion,  
 “than it does from the preamble, and from the body of this section,  
 “that it is meant to bear the general and comprehensive sense  
 “which I have here stated. The reservation which is there made  
 “of our special treaties with other Powers is manifestly inconsistent  
 “with any other more limited construction.

“For if the article had really no other object in its view, than  
 “to renew or to prolong our former engagements with the Northern  
 “Crowns, what imaginable purpose can be answered by this con-

“cluding sentence? Was it necessary to declare that a stipulation  
“extending only to Russia, to Denmark, and to Sweden, should  
“not prejudice our treaties with other Powers? How should it  
“possibly have any such effect? How can our treaties with  
“Portugal or with America be affected by the renewal of those  
“engagements which had long ago declared what articles might  
“be carried in Russian and Danish ships? But the case would  
“indeed be widely different under the more enlarged construction  
“which evidently belongs to this stipulation. The reserve was not  
“only prudent, but necessary, when we undertook to lay down a  
“universal principle, applying alike to our transactions with every  
“independent State. In recognising a claim of pre-existing right,  
“and in establishing a new interpretation of the law of nations, it  
“was unquestionably of extreme importance expressly to reserve  
“the more favourable practice which our subsisting treaties had  
“established with some other Powers.

“And that which was before incongruous and useless would  
“therefore, under such circumstances, become, as far as it extends,  
“an act of wise and commendable forethought.

“On the whole, therefore, I have no doubt that neutral nations  
“will be well warranted in construing this section as declaratory  
“of a universal principle, and applicable to every case where con-  
“traband of war is not defined by special treaty. Nor could we  
“in my opinion, as this treaty now stands, contend in future wars  
“with any shadow of reason, much less with any hope of success,  
“against this interpretation, however destructive it must be of all  
“our dearest interests. Least of all can we resist it, when we are  
“reminded, that in a succeeding article of this very convention we  
“have bound ourselves, by the most distinct engagement, to regard  
“all its principles and stipulations as permanent, and to observe  
“them as our constant rule in matters of commerce and navigation;  
“expressions exactly corresponding with those by which the parties  
“to the two neutral leagues asserted both the permanence and the  
“universality of the principles which were first asserted by those  
“confederacies, and which the present convention so frequently re-  
“cognises and adopts.

“It is, therefore, highly necessary that your Lordships should  
“carefully examine what is this general interpretation which the  
“contracting parties have thus solemnly declared; what sense it is  
“that they have thus permanently affixed to a term so frequently  
“recurring in the practice and law of every civilised nation, and so  
“intimately connected with the exercise of our naval rights as that  
“of contraband of war.”

## APPENDIX IV. PAGE 353.

## PRESCRIPTION.

*Extract from the Commentaries of Donellus (lib. iv. c. iv. p. 334.)  
De usucapionibus longi temporis præscriptionibus, &c.)*

“POSTREMO etiam privata traditione res alienæ invitis dominis ad  
“nos transeunt jure civili, si usus et justa possessio diuturnior ac-  
“cesserit. Sic enim res quærentur jure civili per usum et posses-  
“sionem. Hanc acquisitionem nunc referimus inter eos modos  
“quibus invito domino acquisitio contingit: et recte. Nam et res  
“ita habet, ut quamvis dominus nolit rem suam usucapi ab eo, qui  
“eam *bona fide* possidet, tamen per statutum tempus possessa, pos-  
“sessori acquiratur, ut postea dicetur. Juris quidem interpretatione  
“usucapio alienationis species habetur; quasi existimetur alienare,  
“qui patitur usucapi (*l. alienationis. D. de verb. significat.*). Qua  
“ratione et inter genera alienationis usucapio recenseri solet in  
“ratione domini amittendi, de quo suo loco, sed ductum hoc est ex  
“eo, quod videtur, et quod ut plurimum accidit: quando quidem  
“existimatur unusquisque scire res suas, et a quo possideantur, et  
“cum sciet, posse interrompere usucapionem rem suam repetendo.  
“Verum hoc non semper ita fit. Quid enim, si heres ignoret res  
“aliquas hereditarias, quæ ab alio possidentur? Quid si sciat  
“dominus rem suam ab aliquo possideri, sed non audeat cum eo  
“contendere judicio, quia ejus potentiam metuat? Quid, si ideo  
“non interpellet possessorem, quia in jure errans putet nihilominus  
“sibi jus suum semper salvum manere? In quibus omnibus nemo  
“dicet, si res usucapitur aliter quam invito domino, possessori  
“acquiri. Constat tamen acquiri. Hoc ergo sentio, etsi ita res  
“possideatur invito domino, tamen si possideatur per legitimum  
“tempus, impleri usucapionem proinde et acquisitionem invito  
“domino: quæ ideo ad hunc locum pertinet” (*s*).

## APPENDIX V. PAGE 451.

33 Vict. c. 14.—*An Act to amend the Law relating to the legal  
condition of Aliens and British Subjects.* [12th May, 1870.] (*t*)

“WHEREAS it is expedient to amend the law relating to the legal  
“condition of aliens and British subjects:

(\*) *Hugonis Donelli. Comment. de Jure Civili* (Franco. 1589), lib. iv. c. iv. p. 334.

(t) See also the *Naturalization Oath Act*, 1870, 33 & 34 Vict. c. 102.



"Be it enacted by the Queen's most Excellent Majesty, by and  
 "with the advice and consent of the Lords Spiritual and Temporal,  
 "and Commons, in this present Parliament assembled, and by the  
 "authority of the same, as follows:

Short  
 title.

"1. This Act may be cited for all purposes as 'The Naturalization  
 "Act, 1870.'

*"Status of Aliens in the United Kingdom.*

Capacity  
 of an alien  
 as to prop-  
 erty.

"2. Real and personal property of every description may be taken,  
 "acquired, held, and disposed of by an alien in the same manner in  
 "all respects as by a natural-born British subject; and a title to  
 "real and personal property of every description may be derived  
 "through, from, or in succession to an alien, in the same manner in  
 "all respects as through, from, or in succession to a natural-born  
 "British subject: Provided,—

"(1.) That this section shall not confer any right on an alien to  
 "hold real property situate out of the United Kingdom,  
 "and shall not qualify an alien for any office or for any  
 "municipal, parliamentary, or other franchise.

"(2.) That this section shall not entitle an alien to any right or  
 "privilege as a British subject, except such rights and  
 "privileges in respect of property as are hereby expressly  
 "given to him:

"(3.) That this section shall not affect any estate or interest in  
 "real or personal property to which any person has or  
 "may become entitled, either mediately or immediately, in  
 "possession or expectancy, in pursuance of any disposi-  
 "tion made before the passing of this Act, or in pursuance  
 "of any devolution by law on the death of any person  
 "dying before the passing of this Act.

Power of  
 natural-  
 ized aliens  
 to divest  
 themselves  
 of their  
 status in  
 certain  
 cases.

"3. Where her Majesty has entered into a convention with any  
 "foreign State to the effect that the subjects or citizens of that  
 "State who have been naturalised as British subjects may divest  
 "themselves of their status as such subjects, it shall be lawful for  
 "her Majesty, by Order in Council, to declare that such convention  
 "has been entered into by her Majesty; and from and after the  
 "date of such Order in Council, any person being originally a sub-  
 "ject or citizen of the State referred to in such Order, who has been  
 "naturalized as a British subject, may, within such limit of time as  
 "may be provided in the convention, make a declaration of alienage,  
 "and from and after the date of his so making such declaration  
 "such person shall be regarded as an alien, and as a subject of the  
 "State to which he originally belonged as aforesaid.

"A declaration of alienage may be made as follows; that is to  
 "say,—If the declarant be in the United Kingdom in the presence  
 "of any justice of the peace; if elsewhere in her Majesty's dominions  
 "in the presence of any judge of any court of civil or criminal juris-

"diction, of any justice of the peace, or of any other officer for the time being authorized by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of her Majesty's dominions in the presence of any officer in the diplomatic or consular service of her Majesty.

"4. Any person who by reason of his having been born within the dominions of her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign State a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

How British-born subject may cease to be such.

"5. From and after the passing of this Act, an alien shall not be entitled to be tried by a jury *de medietate linguæ*, but shall be triable in the same manner as if he were a natural-born subject.

Alien not entitled to jury *de medietate linguæ*.

#### *"Expatriation.*

"6. Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien: Provided,—

Capacity of British subject to renounce allegiance to Her Majesty.

"(1.) That where any British subject has before the passing of this Act voluntarily become naturalized in a foreign State and yet is desirous of remaining a British subject, he may, at any time within two years after the passing of this Act, make a declaration that he is desirous of remaining a British subject, and upon such declaration, hereinafter referred to as a declaration of British nationality, being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British subject; with this qualification, that he shall not, when within the limits of the foreign State in which he has been naturalized, be deemed to be a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

"(2.) A declaration of British nationality may be made, and the oath of allegiance be taken as follows; that is to say,—  
"If the declarant be in the United Kingdom in the pre-

'sence of a justice of the peace; if elsewhere in her Majesty's dominions in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of her Majesty's dominions in the presence of any officer in the diplomatic or consular service of her Majesty.

*"Naturalization and resumption of British Nationality.*

Certificate  
of natural-  
ization.

"7. An alien who, within such limited time before making the application hereinafter mentioned as may be allowed by one of her Majesty's Principal Secretaries of State, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalized, either to reside in the United Kingdom, or to serve under the Crown, may apply to one of her Majesty's Principal Secretaries of State for a certificate of naturalization.

"The applicant shall adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The said Secretary of State, if satisfied with the evidence adduced, shall take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision, but such certificate shall not take effect until the applicant has taken the oath of allegiance.

"An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

"The said Secretary of State may, in manner aforesaid grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

"An alien who has been naturalized previously to the passing of this Act may apply to the Secretary of State for a certificate of naturalization under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalized alien upon the same terms and subject to the same conditions in and upon which such certificate might have been granted if such alien had not been previously naturalized in the United Kingdom.

"8. A natural-born British subject who has become an alien in pursuance of this Act, and is in this Act referred to as a statutory alien, may, on performing the same conditions and adducing the same evidence as is required in the case of an alien applying for a certificate of nationality, apply to one of her Majesty's Principal Secretaries of State for a certificate hereinafter referred to as a certificate of re-admission to British nationality, re-admitting him to the status of a British subject. The said Secretary of State shall have the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance shall in like manner be required previously to the issuing of the certificate.

Certificate of re-admission to British nationality.

"A statutory alien to whom a certificate of re-admission to British nationality has been granted shall, from the date of the certificate of re-admission, but not in respect of any previous transaction, resume his position as a British subject; with this qualification, that within the limits of the foreign state of which he became a subject he shall not be deemed to be a British subject unless he has ceased to be a subject of that foreign state according to the laws thereof, or in pursuance of a treaty to that effect.

"The jurisdiction by this Act conferred on the Secretary of State in the United Kingdom in respect of the grant of a certificate of re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession; and residence in such possession shall, in the case of such person, be deemed equivalent to residence in the United Kingdom.

"9. The oath in this Act referred to as the oath of allegiance shall be in the form following; that is to say,  
 "I do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria, her heirs and successors, according to law. So help me GOD."

Form of oath of allegiance.

#### *"National status of Married Women and Infant Children.*

"10. The following enactments shall be made with respect to the national status of women and children:

National status of married women and infant children.

"(1.) A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject:

"(2.) A widow being a natural-born British subject who has

"become an alien by or in consequence of her marriage,  
 "shall be deemed to be a statutory alien, and may as  
 "such at any time during widowhood obtain a certificate  
 "of re-admission to British nationality in manner pro-  
 "vided by this Act:

- "(3.) Where the father being a British subject, or the mother  
 "being a British subject and a widow, becomes an alien  
 "in pursuance of this Act, every child of such father or  
 "mother who during infancy has become resident in the  
 "country where the father or mother is naturalized, and  
 "has, according to the laws of such country, become  
 "naturalized therein, shall be deemed to be a subject of  
 "the State of which the father or mother has become a  
 "subject, and not a British subject:
- "(4.) Where the father, or the mother being a widow, has  
 "obtained a certificate of re-admission to British nation-  
 "ality, every child of such father or mother, who during  
 "infancy has become resident in the British dominions  
 "with such father or mother, shall be deemed to have  
 "resumed the position of a British subject to all intents:
- "(5.) Where the father, or the mother being a widow, has  
 "obtained a certificate of naturalization in the United  
 "Kingdom, every child of such father or mother, who  
 "during infancy has become resident with such father or  
 "mother in any part of the United Kingdom, shall be  
 "deemed to be a naturalized British subject.

*"Supplemental Provisions.*

Regula-  
 tions as to  
 registra-  
 tion.

- "11. One of her Majesty's Principal Secretaries of State may by  
 "regulation provide for the following matters:
- "(1.) The form and registration of declarations of British  
 "nationality:
- "(2.) The form and registration of certificates of naturalization  
 "in the United Kingdom:
- "(3.) The form and registration of certificates of re-admission  
 "to British nationality:
- "(4.) The form and registration of declarations of alienage:
- "(5.) The registration by officers in the diplomatic or consular  
 "service of her Majesty of the births and deaths of  
 "British subjects who may be born or die out of her  
 "Majesty's dominions, and of the marriages of persons  
 "married at any of her Majesty's embassies or lega-  
 "tions:
- "(6.) The transmission to the United Kingdom for the purpose  
 "of registration or safe keeping, or of being produced as  
 "evidence, of any declarations or certificates made in

"pursuance of this Act out of the United Kingdom, or  
 "of any copies of such declarations or certificates, also of  
 "copies of entries contained in any register kept out of  
 "the United Kingdom in pursuance of or for the purpose  
 "of carrying into effect the provisions of this Act :

"(7.) With the consent of the Treasury the imposition and appli-  
 "cation of fees in respect of any registration authorized  
 "to be made by this Act, and in respect of the making  
 "any declaration or the grant of any certificate autho-  
 "rized to be made or granted by this Act.

"The said Secretary of State, by a further regulation, may repeal,  
 "alter, or add to any regulation previously made by him in pursu-  
 "ance of this section.

"Any regulation made by the said Secretary of State in pur-  
 "suance of this section shall be deemed to be within the powers  
 "conferred by this Act, and shall be of the same force as if it had  
 "been enacted in this Act, but shall not, so far as respects the  
 "imposition of fees, be in force in any British possession, and shall  
 "not, so far as respects any other matter, be in force in any British  
 "possession in which any Act or ordinance to the contrary of or  
 "inconsistent with any such direction may for the time being be in  
 "force.

"12. The following regulations shall be made with respect to  
 "evidence under this Act :—

Regula-  
 tions as to  
 evidence.

"(1.) Any declaration authorized to be made under this Act may  
 "be proved in any legal proceeding by the production of  
 "the original declaration, or of any copy thereof certified  
 "to be a true copy by one of her Majesty's Principal  
 "Secretaries of State, or by any person authorized by  
 "regulations of one of her Majesty's Principal Secretaries  
 "of State to give certified copies of such declaration, and  
 "the production of such declaration or copy shall be  
 "evidence of the person therein named as declarant  
 "having made the same at the date in the said declaration  
 "mentioned :

"(2.) A certificate of naturalization may be proved in any legal  
 "proceeding by the production of the original certificate,  
 "or of any copy thereof certified to be a true copy by  
 "one of her Majesty's Principal Secretaries of State, or  
 "by any person authorized by regulations of one of her  
 "Majesty's Principal Secretaries of State to give certified  
 "copies of such certificate :

"(3.) A certificate of re-admission to British nationality may be  
 "proved in any legal proceeding by the production of the  
 "original certificate, or of any copy thereof certified to be  
 "a true copy by one of her Majesty's Principal Secre-  
 "taries of State, or by any person authorized by regula-

- “ tions of one of her Majesty’s Principal Secretaries of State to give certified copies of such certificate : ”
- “(4.) Entries in any register authorized to be made in pursuance, “ of this Act shall be proved by such copies and certified “ in such manner as may be directed by one of her “ Majesty’s Principal Secretaries of State, and the copies “ of such entries shall be evidence of any matters by this “ Act or by any regulation of the said Secretary of State “ authorized to be inserted in the register :
- “(5.) The Documentary Evidence Act, 1868, shall apply to any “ regulation made by a Secretary of State, in pursuance “ of or for the purpose of carrying into effect any of the, “ provisions of this Act.

“ *Miscellaneous.* ”

Saving of letters of denization.

Saving as to British ships.

Saving of allegiance prior to expatriation.

Power of colonies to legislate with respect to naturalization.

Definition of terms.

“ 13. Nothing in this Act contained shall affect the grant of letters of denization by her Majesty.

“ 14. Nothing in this Act contained shall qualify an alien to be the owner of a British ship.

“ 15. Where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien.

“ 16. All laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by her Majesty in the same manner, and subject to the same rules in and subject to which her Majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession.

“ 17. In this Act, if not inconsistent with the context or subject-matter thereof,—

“ ‘ Disability ’ shall mean the status of being an infant, lunatic, idiot, or married woman :

“ ‘ British possession ’ shall mean any colony, plantation, island, territory, or settlement within her Majesty’s dominions, and not within the United Kingdom, and all territories and places under one legislature are deemed to be one British possession for the purposes of this Act :

“ ‘ The Governor of any British possession ’ shall include any person exercising the chief authority in such possession :

“ ‘ Officer in the diplomatic service of her Majesty ’ shall mean any ambassador, minister or chargé-d’affaires, or secretary of legation, or any person appointed by such ambassador, minister, chargé-d’affaires, or secretary of legation to execute

"any duties imposed by this Act on an officer in the diplomatic  
"service of her Majesty :

"'Officer in the consular service of her Majesty' shall mean  
"and include consul-general, consul, vice-consul, and consular  
"agent, and any person for the time being discharging the  
"duties of consul-general, consul, vice-consul, and consular  
"agent.

*" Repeal of Acts mentioned in Schedule.*

"18. The several Acts set forth in the first and second parts of  
"the schedule annexed hereto shall be wholly repealed, and the  
"Acts set forth in the third part of the said schedule shall be  
"repealed to the extent therein mentioned; provided that the repeal  
"enacted in this Act shall not affect—

Repeal of  
Acts.

"(1.) Any right acquired or thing done before the passing of  
"this Act :

"(2.) Any liability accruing before the passing of this Act :

"(3.) Any penalty, forfeiture, or other punishment incurred or to  
"be incurred in respect of any offence committed before  
"the passing of this Act :

"(4.) The institution of any investigation or legal proceeding or  
"any other remedy for ascertaining or enforcing any  
"such liability, penalty, forfeiture, or punishment as  
"aforesaid."

Here follows the schedule of repealed Acts.

TREATY OF NATURALIZATION WITH THE UNITED STATES.

(*Convention between Her Majesty and the United States of America  
relative to Naturalization. Signed at London, May 13, 1870.*)  
[Ratifications exchanged at London, August 10, 1870.]

"Her Majesty the Queen of the United Kingdom of Great Britain  
"and Ireland, and the President of the United States of America,  
"being desirous to regulate the citizenship of British subjects who  
"have emigrated, or who may emigrate, from the British dominions  
"to the United States of America, and of citizens of the United  
"States of America who have emigrated, or who may emigrate, from  
"the United States of America to the British dominions, have re-  
"solved to conclude a convention for that purpose, and have named  
"as their plenipotentiaries, that is to say :—

"Her Majesty the Queen of the United Kingdom of Great Britain  
"and Ireland, the Right Honourable George William Frederick,  
"Earl of Clarendon, Baron Hyde of Hindon, a Peer of the United  
"Kingdom, a Member of her Britannic Majesty's Most Honourable  
"Privy Council, Knight of the Most Noble Order of the Garter,  
"Knight Grand Cross of the Most Honourable Order of the Bath,  
"her Britannic Majesty's Principal Secretary of State for Foreign  
"Affairs;



"And the President of the United States of America, John  
"Lothrop Motley, Esquire, Envoy Extraordinary and Minister  
"Plenipotentiary of the United States of America to her Britannic  
"Majesty ;

"Who, after having communicated to each other their respective  
"full powers, found to be in good and due form, have agreed upon  
"and concluded the following articles :—

"Article I.—British subjects who have become, or shall become,  
"and are naturalized according to law within the United States of  
"America as citizens thereof, shall, subject to the provisions of  
"Article II., be held by Great Britain to be in all respects and for  
"all purposes citizens of the United States, and shall be treated as,  
"such by Great Britain.

"Reciprocally, citizens of the United States of America who have  
"become, or shall become, and are naturalized according to law  
"within the British dominions as British subjects, shall, subject to  
"the provisions of Article II., be held by the United States to be in  
"all respects and for all purposes British subjects, and shall be  
"treated as such by the United States.

"Article II.—Such British subjects as aforesaid who have be-  
"come and are naturalized as citizens within the United States, shall  
"be at liberty to renounce their naturalization and to resume their  
"British nationality, provided that such renunciation be publicly  
"declared within two years after the twelfth day of May, 1870.

"Such citizens of the United States as aforesaid who have become  
"and are naturalized within the dominions of her Britannic Majesty  
"as British subjects, shall be at liberty to renounce their natu-  
"ralization and to resume their nationality as citizens of the United  
"States, provided that such renunciation be publicly declared within  
"two years after the exchange of the ratifications of the present con-  
"vention.

"The manner in which this renunciation may be made and  
"publicly declared shall be agreed upon by the Governments of the  
"respective countries.

"Article III.—If any such British subject as aforesaid, natu-  
"ralized in the United States, should renew his residence within the  
"dominions of her Britannic Majesty, her Majesty's Government  
"may, on his own application and on such conditions as that Govern-  
"ment may think fit to impose, re-admit him to the character and  
"privileges of a British subject, and the United States shall not, in  
"that case, claim him as a citizen of the United States on account of  
"his former naturalization.

"In the same manner, if any such citizen of the United States  
"as aforesaid, naturalized within the dominions of her Britannic  
"Majesty, should renew his residence in the United States, the  
"United States Government may, on his own application and on  
"such conditions as that Government may think fit to impose, re-  
"admit him to the character and privileges of a citizen of the United

"States, and Great Britain shall not, in that case, claim him as a British subject on account of his former naturalization.

"Article IV.—The present convention shall be ratified by her Britannic Majesty and by the President of the United States, by and with the advice and consent of the Senate thereof, and the ratifications shall be exchanged at London as soon as may be within twelve months from the date hereof.

"In witness whereof the respective plenipotentiaries have signed the same, and have affixed thereto their respective seals.

"Done at London the thirteenth day of May, in the year of our Lord 1870.

(L.S.)

"CLARENDON.

(L.S.)

"JOHN LOTHROP MOTLEY."

"35 & 36 Vict. c. 39. *An Act for amending the Law in certain cases in relation to Naturalization.* [25th July 1872.]

"Whereas by a convention between her Majesty and the United States of America, supplementary to the convention of the thirteenth day of May one thousand eight hundred and seventy, respecting naturalization, and signed at Washington on the twenty-third day of February one thousand eight hundred and seventy-one, and a copy of which is contained in the schedule to this Act, provision is made in relation to the renunciation by the citizens and subjects therein mentioned of naturalization or nationality in the presence of the officers therein mentioned:

"And whereas doubts are entertained whether such provisions are altogether in accordance with the Naturalization Act, 1870; and whereas other doubts have arisen with respect to the effect of 'The Naturalization Act, 1870,' on the rights of women married before the passing of that Act; and it is expedient to remove such doubts:

"Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

"1. This Act may be cited for all purposes as the Naturalization Act, 1872, and this Act and 'The Naturalization Act, 1870,' may be cited together as 'The Naturalization Acts, 1870 and 1872.' Short title.

"2. Any renunciation of naturalization or of nationality made in manner provided by the said supplementary convention by the persons and under the circumstances in the said convention in that behalf mentioned shall be valid to all intents, and shall be deemed to be authorized by the said Naturalization Act, 1870. Confirmation of renunciation of nationality under the Convention.  
 "This section shall be deemed to take effect from the date at which the said supplementary convention took effect.

"3. Nothing contained in 'The Naturalization Act, 1870,' shall Saving

clause as to  
property of  
married  
women.

"deprive any married woman of any estate or interest in real or personal property to which she may have become entitled previously to the passing of that Act, or affect such estate or interest to her prejudice."

## SCHEDULE.

"*Convention between Her Majesty and the United States of America, supplementary to the Convention of May 13, 1870, respecting Naturalization. Signed at Washington, February 23, 1871. [Ratifications exchanged at Washington May 4, 1871.]*

"Whereas by the second article of the convention between her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the United States of America for regulating the citizenship of subjects and citizens of the contracting parties who have emigrated or may emigrate from the dominions of the one to those of the other party, signed at London, on the 13th of May, 1870, it was stipulated that the manner in which the renunciation by such subjects and citizens of their naturalization, and the resumption of their native allegiance, may be made and publicly declared, should be agreed upon by the Governments of the respective countries: her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the President of the United States of America, for the purpose of effecting such agreement, have resolved to conclude a supplemental convention, and have named as their plenipotentiaries, that is to say: her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Sir Edward Thornton, Knight Commander of the Most Honourable Order of the Bath, and her Envoy Extraordinary and Minister Plenipotentiary to the United States of America; and the President of the United States of America, Hamilton Fish, Secretary of State; who have agreed as follows:

"Art. I.—Any person being originally a citizen of the United States who had, previously to May 13, 1870, been naturalized as a British subject, may at any time before August 10, 1872, and any British subject who, at the date first aforesaid, had been naturalized as a citizen within the United States, may at any time before May 12, 1872, publicly declare his renunciation of such naturalization by subscribing an instrument in writing, substantially in the form hereunto appended, and designated as Annex A.

"Such renunciation, by an original citizen of the United States, of British nationality, shall, within the territories and jurisdiction of the United States, be made in duplicate, in the presence of any court authorized by law for the time being to admit aliens to naturalization, or before the clerk or prothonotary of any such court: if the declarant be beyond the territories of the United States, it shall be made in duplicate, before any diplomatic or con-

“sular officer of the United States. One of such duplicates shall remain of record in the custody of the court or officer in whose presence it was made; the other shall be, without delay, transmitted to the department of State.

“Such renunciation, if declared by an original British subject, of his acquired nationality as a citizen of the United States, shall, if the declarant be in the United Kingdom of Great Britain and Ireland, be made in duplicate, in the presence of a justice of the peace; if elsewhere in her Britannic Majesty’s dominions, in triplicate, in the presence of any judge of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorized by law, in the place in which the declarant is, to administer an oath for any judicial or other legal purpose; if out of her Majesty’s dominions, in triplicate, in the presence of any officer in the diplomatic or consular service of her Majesty.

“Art. II.—The contracting parties hereby engage to communicate each to the other, from time to time, lists of the persons who, within their respective dominions and territories, or before their diplomatic and consular officers, have declared their renunciation of naturalization, with the dates and places of making such declarations, and such information as to the abode of the declarants, and the times and places of their naturalization, as they may have furnished.

“Art. III.—The present convention shall be ratified by her Britannic Majesty, and by the President of the United States by and with the advice and consent of the Senate thereof, and the ratifications shall be exchanged at Washington as soon as may be convenient.

“In witness whereof, the respective plenipotentiaries have signed the same, and have affixed thereto their respective seals.

“Done at Washington, the twenty-third day of February, in the year of our Lord one thousand eight hundred and seventy-one.

(L.S.) “EDWD. THORNTON.

(L.S.) “HAMILTON FISH.

#### ANNEX (A.)

“I, A.B., of (*insert abode*), being originally a citizen of the United States of America (*or a British subject*), and having become naturalized within the dominions of her Britannic Majesty as a British subject (*or as a citizen within the United States of America*), do hereby renounce my naturalization as a British subject (*or citizen of the United States*); and declare that it is my desire to resume my nationality as a citizen of the United States (*or British subject*).

(Signed) “A.B.

"Made and subscribed before me in (insert  
 "country or other subdivision, and state, province, colony, legation,"  
 "or consulate), this day of 187  
 (Signed) "E.F.,  
 "Justice of the Peace (or other title).  
 (L.S.) "EDWD. THORNTON.  
 (L.S.) "HAMILTON FISH.

## APPENDIX VI. PAGES 453 & 556.

### RIGHT OF JURISDICTION OVER PERSONS AND THINGS.

"16 & 17 Vict. c. 107.—*An Act to amend and consolidate the Laws*  
 "*relating to the Customs of the United Kingdom and of the Isle of*  
 "*Man, and certain Laws relating to Trade and Navigation and*  
 "*the British Possessions.* [20th August, 1853.]

"SEC. 150.—The following goods may, by Proclamation or Order  
 "in Council, be prohibited either to be exported or carried coast-  
 "wise: arms, ammunition, and gunpowder, military and naval  
 "stores, and any articles which her Majesty shall judge capable of  
 "being converted into or made useful in increasing the quantity of  
 "military or naval stores, provisions, or any sort of victual which  
 "may be used as food by man, and if any goods so prohibited shall  
 "be exported from the United Kingdom, or carried coastwise or be  
 "water-borne to be so exported or carried, they shall be forfeited."

This section was repealed by the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), but its provisions re-appear in the 138th section of that Act in almost identical terms, as follows:—

"Sec 138.—The following goods may, by Proclamation or Order  
 "in Council, be prohibited either to be exported or carried coast-  
 "wise:—arms, ammunition, and gunpowder, military and naval  
 "stores, and any articles which her Majesty shall judge capable of  
 "being converted into or made useful in increasing the quantity of  
 "military or naval stores, provisions, or any sort of victual which  
 "may be used as food for man, and if any goods so prohibited shall  
 "be exported or brought to any quay or other place to be shipped  
 "for exportation from the United Kingdom or carried coastwise, or  
 "be water-borne to be so exported or carried, they shall be for-  
 "feited."

In accordance with the provisions of the first Statute, soon after the breaking out of the war with Russia (Saturday, February 18, 1854), the Queen issued the following Proclamation:—

"By the Queen—A Proclamation.

"VICTORIA R.

"Whereas, by the Customs Consolidation Act, 1853, certain  
 "goods may be prohibited either to be exported or carried coast-

"wise; and whereas we, by and with the advice of our Privy Council, deem it expedient and necessary to prohibit the goods hereinafter-mentioned either to be exported or carried coastwise; we, by and with the advice aforesaid, do hereby order and direct that, from and after the date hereof, all ARMS, AMMUNITION and GUNPOWDER, MILITARY and NAVAL STORES, and the following articles—being articles which we have judged capable of being converted into, or made useful in increasing the quantity of military or naval stores—that is to say, marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, fire bars, and every article or any other component part of an engine or boiler, or any article whatsoever which is, or can or may become applicable for the manufacture of marine machinery, shall be and the same are hereby prohibited either to be exported from the United Kingdom or carried coastwise.

"Given at our Court at Buckingham Palace, this eighteenth day of February, in the year of our Lord One thousand eight hundred and fifty-four, and in the seventeenth year of our reign.

"GOD SAVE THE QUEEN."

*Act of Congress, with Notes (extracted from Dunlop's Digest of the General Laws of the United States, ed. 1856.*

"Chap. 88.—An Act (u) in addition to the 'Act for the punishment of certain crimes against the United States,' and to repeal the Acts therein mentioned. [April 20, 1818.]

"That if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people in war, by land or by sea, against any prince, state, colony, district, or people with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.

"Sec. 2.—That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or

American Foreign Enlistment Act.

Fine \$2,000 and imprisonment for citizens accepting commissions within the United States, &c. to serve foreign States.

(u) This Act re-enacts the Acts of 1794, ch. 50, 1797, 58, and of 1817, ch. 58, with some addition, and by adding the words "colony, district, or people."—7 Wheat. 489, *The Gran Para*.

The object of the laws was to put an end to the slave trade, and to prevent the introduction of slaves from foreign countries.—11 Peters, 73, *United States v. the ship Garonne*, *United States v. Skiddy*.

Slaves of Louisiana taken by their owners to France in 1835, and brought back with their own consent, is not a case within the Acts.—11 Peters, 73, *United States v. Skiddy*.

For any person in the United States, enlisting others, &c. to serve a foreign state, &c.

"retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years: Provided that this Act shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people, who shall transiently be within the United States, and shall on board of any vessel of war, letter of marque, or privateer, which, at the time of its arrival within the United States, was fitted and equipped as such, enlist or enter himself, or hire or retain another subject or citizen of the same foreign prince, state, colony, district, or people (x), who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people.

Fitting out or attempting to fit out.

"Sec. 3.—That if any person shall within the limits of the United States fit out and arm, or attempt (y) to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or (z) arming of any ship or vessel with

(x) The intent must be a fixed one, and not contingent, and formed within the United States, and before the vessel leaves the United States.—4 *Peters*, 445, 466, *United States v. Quincy*; 3 *Dal.* 307, *Moodie v. The Alfred*.

The law does not prohibit the sailing of armed vessels belonging to our citizens, out of our ports, on bond, &c., that they will not be employed to commit hostilities against powers at peace with us.—6 *Peters*, 466; *Johnson, J.*

The indictment charged the fitting out of the *Bolivar* with intent that she should be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata; held that, although the United Provinces were recognized by the United States, the charge, under the inuendo, was sufficiently laid.—6 *Peters*, 445, 407, *United States v. Quincy*.

(y) An effort to fit out will satisfy the law.—6 *Peters*, 445-464.

The vessel was fitted out and repaired at Baltimore, and, with some warlike munitions on bond given, sailed for St. Thomas, where she was fully armed, and cruised under a Buenos Ayrean commission. This was held to be an attempt.—6 *Peters*, 445, *United States v. Quincy*.

(z) Either will constitute the offence.—6 *Peters*, 445, 464, *United States v. Quincy*. It is not necessary to charge the fitting and arming.

The owner is liable under the Act, if he authorized and superintended the fitting and arming, without being personally present.

It is not essential that the fitment should have been completed. It is not necessary that even equipment of a slave voyage should have been

"intent (a) that such ship or vessel shall be employed in the service of any foreign prince or state (b), or of any colony, district, or people, to cruize or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people (c) with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one half to the use of the informer, and the other half to the use of the United States.

The vessel, &c., forfeited.

Half to the informer.

"Sect. 4.—That if any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming, any private ship or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruize or commit hostilities upon the citizens of the United States, or their property, or shall take the command of, or enter on board of any such ship or vessel for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such person so offending shall be deemed guilty of a high misdemeanor, and fined not more than ten thousand dollars, and imprisoned not more than ten years; and the trial for such offence, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought.

For citizens fitting out or arming, &c., or aiding.

To be tried where apprehended, or first brought.

taken on board in the port of the United States. In this case part of the equipment of the *General Winder* for a slaving voyage was shipped on another vessel for St. Thomas, and then transhipped to the *General Winder*.

The particulars of the fitting out need not be set out in the indictment; they are minute acts, incapable of exact specification, 473, 475.

The indictment should allege that the vessel was built, fitted, &c., within the jurisdiction of the United States, 476, 477, and "with intent to employ the vessel" in the slave trade; and alleging that "the intent" was "that the vessel should be employed in the slave trade" was not sufficient, 476.—12 *Wheat*, 460, *United States v. Gooding*.

(a) Although the arms and ammunition were cleared as cargo, and the men enlisted as for a mercantile voyage.—7 *Wheat*, 471, 486, *The Gram Para*.

(b) That is, a Government acknowledged by the United States.—6 *Peters*, 467.

(c) Note (x), sec. 2.



Augment-  
ing in the  
United  
States the  
force of  
foreign-  
armed  
vessels.

"Sec. 5.—That if any person shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting the force of any ship of war, cruizer, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruizer, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war, every person so offending shall be deemed guilty of a high misdemeanor, shall be fined not more than one thousand dollars, and be imprisoned not more than one year.

Setting on  
foot within  
the United  
States any  
military  
expedition  
against a  
friendly  
power.

"Sec. 6.—That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are (at) peace, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years (d).

District  
Courts to  
have cogni-  
zance of.

"Sec. 7.—That the District Courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States or within a marine league of the coasts or shores thereof.

The presi-  
dent may  
employ the  
forces or  
the militia  
for sup-  
pressing  
such expe-  
ditions.

"Sec. 8.—That in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruizer, or other armed vessel shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the provisions and prohibitions of this Act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined, and in every case in which any process issuing out of any Court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruizer, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, in every such case it shall be lawful for the President of the United States or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces

(d) Fenian invaders of Canada have been tried and punished under this section by United States Court, 1870.

"of the United States, or of the militia thereof, for the purpose of  
 "taking possession of and detaining any such ship or vessel, with  
 "her prize or prizes, if any, in order to the execution of the pro-  
 "hibitions and penalties of this Act, and to the restoring the prize  
 "or prizes in the cases in which restoration shall have been  
 "adjudged, and also for the purpose of preventing the carrying on  
 "of any such expedition or enterprise from the territories or juris-  
 "diction of the United States against the territories or dominions  
 "of any foreign prince or state, or of any colony, district, or people  
 "with whom the United States are at peace.

"Sec. 9.—That it shall be lawful for the President of the United  
 "States, or such person as he shall empower for that purpose, to  
 "employ such part of the land or naval forces of the United States,  
 "or of the militia thereof, as shall be necessary to compel any  
 "foreign ship or vessel to depart the United States in all cases in  
 "which by the laws of nations or the treaties of the United States  
 "they ought not to remain within the United States.

"Sec. 10.—That the owners or consignees of every armed ship or  
 "vessel sailing out of the ports of the United States, belonging wholly  
 "or in part to citizens thereof, shall enter into bond to the United  
 "States, with sufficient sureties, prior to clearing out the same, in  
 "double the amount of the value of the vessel and cargo on board,  
 "including her armament, that the said ship or vessel shall not be  
 "employed by such owners to cruize or commit hostilities against the  
 "subjects, citizens, or property of any foreign prince or state, or of  
 "any colony, district, or people with whom the United States are at  
 "peace.

"Sec. 11.—That the collectors of the customs be, and they are  
 "hereby respectively authorized and required to detain any vessel  
 "manifestly built for warlike purposes, and about to depart the  
 "United States, of which the cargo shall principally consist of arms  
 "and munitions of war, when the number of men shipped on board  
 "or other circumstances shall render it probable that such vessel is  
 "intended to be employed by the owner or owners to cruize or  
 "commit hostilities upon the subjects, citizens, or property of any  
 "foreign prince or state, or of any colony, district, or people with  
 "whom the United States are at peace, until the decision of the  
 "President be had thereon, or until the owner or owners shall give  
 "such bond and security as is required of the owners of armed  
 "ships by the preceding section of this Act.

"Sec. 12.—That the Act passed on the 5th day of June, 1794,  
 "entitled 'An Act in addition to the Act for the Punishment of  
 "certain Crimes against the United States,' continued in force, for  
 "a limited time, by the Act of the 2nd of March, 1797, and per-  
 "petuated by the Act passed on the 24th of April, 1800, and the  
 "Act passed on the 14th day of June, 1797, entitled 'An Act to  
 "prevent Citizens of the United States from privateering against  
 "Nations in amity with, or against the Citizens of, the United

May employ the  
 forces or  
 the militia  
 to compel  
 the depart-  
 ure of  
 vessels.

Owners,  
 &c. of  
 armed  
 vessels  
 sailing to  
 give bond  
 not to com-  
 mit hostili-  
 ties, &c.

Collectors  
 to detain  
 vessels  
 built for  
 warlike  
 purposes  
 and about  
 to depart,  
 when prob-  
 ably they  
 are in-  
 tended  
 against a  
 friendly  
 Power.

5 June  
 1794, c.  
 50; 14  
 June 1797,  
 c. 1; 24  
 April 1800,  
 c. 35, and  
 3 March,  
 1817, c. 58;  
 repealed.

"States," and the Act passed the 3rd day of March, 1817, entitled "An Act more effectually to preserve the neutral Relations of the United States," be and the same are hereby severally repealed: *provided, nevertheless*, that persons having heretofore offended against any of the Acts aforesaid may be prosecuted, convicted, and punished as if the same were not repealed; and no forfeiture heretofore incurred by a violation of any of the Acts aforesaid shall be affected by such repeal.

Not to  
prevent  
the punish-  
ment of  
treason,  
&c.

"Sec. 13.—That nothing in the foregoing Act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by the laws of the United States."

"33 & 34 Vict. c. 90.—*An Act to regulate the conduct of Her Majesty's subjects during the existence of hostilities between Foreign States with which Her Majesty is at peace.* [9th August, 1870.]

"Whereas it is expedient to make provision for the regulation of the conduct of her Majesty's subjects during the existence of hostilities between foreign states with which her Majesty is at peace:

"Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

#### "Preliminary.

Short title  
of Act.

Applica-  
tion of  
Act.

Com-  
mencement  
of Act.

"1. This Act may be cited for all purposes as 'The Foreign Enlistment Act, 1870.'

"2. This Act shall extend to all the dominions of her Majesty, including the adjacent territorial waters.

"3. This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act.

#### "Illegal Enlistment.

Penalty on  
enlistment  
in service  
of foreign  
State.

"4. If any person, without the licence of her Majesty, being a British subject, within or without her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid,—

"He shall be guilty of an offence against this Act, and shall be  
 "punishable by fine and imprisonment, or either of such  
 "punishments at the discretion of the court before which the  
 "offender is convicted; and imprisonment, if awarded, may  
 "be either with or without hard labour.

"5. If any person, without the licence of her Majesty, being a  
 "British subject, quits or goes on board any ship with a view of  
 "quitting her Majesty's dominions, with intent to accept any com-  
 "mission or engagement in the military or naval service of any  
 "foreign state at war with a friendly state, or, whether a British  
 "subject or not, within her Majesty's dominions, induces any other  
 "person to quit or to go on board any ship with a view of quitting  
 "her Majesty's dominions with the like intent,—

Penalty on leaving her Majesty's dominions with intent to serve a foreign state.

"He shall be guilty of an offence against this Act, and shall be  
 "punishable by fine and imprisonment, or either of such  
 "punishments, at the discretion of the court before which  
 "the offender is convicted; and imprisonment, if awarded,  
 "may be either with or without hard labour.

"6. If any person induces any other person to quit her Majesty's  
 "dominions or to embark on any ship within her Majesty's do-  
 "minions under a misrepresentation or false representation of the  
 "service in which such person is to be engaged, with the intent or  
 "in order that such person may accept or agree to accept any com-  
 "mission or engagement in the military or naval service of any  
 "foreign state at war with a friendly state,—

Penalty on embarking persons under false representations as to service.

"He shall be guilty of an offence against this Act, and shall be  
 "punishable by fine and imprisonment, or either of such  
 "punishments, at the discretion of the court before which  
 "the offender is convicted; and imprisonment, if awarded,  
 "may be either with or without hard labour.

"7. If the master or owner of any ship, without the licence of  
 "her Majesty, knowingly either takes on board, or engages to take on  
 "board, or has on board such ship within her Majesty's dominions  
 "any of the following persons, in this Act referred to as illegally  
 "enlisted persons; that is to say,—

Penalty on taking illegally enlisted persons on board ship.

"(1.) Any person who, being a British subject within or without  
 "the dominions of her Majesty, has, without the licence  
 "of her Majesty, accepted or agreed to accept any com-  
 "mission or engagement in the military or naval service  
 "of any foreign state at war with any friendly state:

"(2.) Any person, being a British subject, who, without the  
 "licence of her Majesty, is about to quit her Majesty's  
 "dominions with intent to accept any commission or  
 "engagement in the military or naval service of any  
 "foreign state at war with a friendly state:

"(3.) Any person who has been induced to embark under a mis-  
 "representation or false representation of the service in  
 "which such person is to be engaged, with the intent or

“in order that such person may accept or agree to accept  
 “any commission or engagement in the military or  
 “naval service of any foreign state at war with a friendly  
 “state :

“Such master or owner shall be guilty of an offence against this Act,  
 “and the following consequences shall ensue ; that is to say,—

“(1.) The offender shall be punishable by fine and imprisonment,  
 “or either of such punishments, at the discretion of the  
 “court before which the offender is convicted ; and im-  
 “prisonment, if awarded, may be either with or without  
 “hard labour ; and

“(2.) Such ship shall be detained until the trial and conviction  
 “or acquittal of the master or owner, and until all  
 “penalties inflicted on the master or owner have been  
 “paid, or the master or owner has given security for the  
 “payment of such penalties to the satisfaction of two  
 “justices of the peace, or other magistrate or magistrates  
 “having the authority of two justices of the peace : and

“(3.) All illegally enlisted persons shall immediately on the dis-  
 “covery of the offence be taken on shore, and shall not  
 “be allowed to return to the ship.

*“Illegal Shipbuilding and Illegal Expeditions.*

Penalty on  
 illegal  
 ship-  
 building  
 and illegal  
 expedi-  
 tions.

“8. If any person within her Majesty's dominions, without the  
 “licence of her Majesty, does any of the following acts ; that is to  
 “say,—

“(1.) Builds or agrees to build, or causes to be built, any ship with  
 “intent or knowledge, or having reasonable cause to be-  
 “lieve, that the same shall or will be employed in the  
 “military or naval service of any foreign state at war  
 “with any friendly state : or

“(2.) Issues or delivers any commission for any ship with intent  
 “or knowledge, or having reasonable cause to believe that  
 “the same shall or will be employed in the military or  
 “naval service of any foreign state at war with any  
 “friendly state : or

“(3.) Equips any ship with intent or knowledge, or having  
 “reasonable cause to believe, that the same shall or will  
 “be employed in the military or naval service of any  
 “foreign state at war with any friendly state : or

“(4.) Despatches, or causes or allows to be despatched, any ship  
 “with intent or knowledge, or having reasonable cause to  
 “believe, that the same shall or will be employed in the  
 “military or naval service of any foreign state at war with  
 “any friendly state :

“Such person shall be deemed to have committed an offence against  
 “this Act, and the following consequences shall ensue :

(1.) The offender shall be punishable by fine and imprisonment,

“or either of such punishments, at the discretion of the  
 “court before which the offender is convicted; and im-  
 “prisonment, if awarded, may be either with or without  
 “hard labour.

“(2.) The ship in respect of which any such offence is committed,  
 “and her equipment, shall be forfeited to her Majesty :

“Provided that a person building, causing to be built, or equipping  
 “a ship in any of the cases aforesaid, in pursuance of a contract  
 “made before the commencement of such war as aforesaid, shall not  
 “be liable to any of the penalties imposed by this section in respect  
 “of such building or equipping if he satisfies the conditions follow-  
 “ing; that is to say,—

“(1.) If forthwith upon a proclamation of neutrality being issued  
 “by her Majesty he gives notice to the Secretary of State  
 “that he is so building, causing to be built, or equipping  
 “such ship, and furnishes such particulars of the contract  
 “and of any matters relating to, or done, or to be done  
 “under the contract as may be required by the Secretary  
 “of State :

“(2.) If he gives such security, and takes and permits to be taken  
 “such other measures, if any, as the Secretary of State  
 “may prescribe for ensuring that such ship shall not be  
 “despatched, delivered, or removed without the licence  
 “of her Majesty until the termination of such war as  
 “aforesaid.

“9. Where any ship is built by order of or on behalf of any  
 “foreign state when at war with a friendly state, or is delivered to  
 “or to the order of such foreign state, or any person who to the  
 “knowledge of the person building is an agent of such foreign state,  
 “or is paid for by such foreign state or such agent, and is employed  
 “in the military or naval service of such foreign state, such ship  
 “shall, until the contrary is proved, be deemed to have been built  
 “with a view to being so employed, and the burden shall lie on the  
 “builder of such ship of proving that he did not know that the ship  
 “was intended to be so employed in the military or naval service of  
 “such foreign state.

Presump-  
 tion as to  
 evidence in  
 case of il-  
 legal ship.

“10. If any person within the dominions of her Majesty, and  
 “without the licence of her Majesty,—

“By adding to the number of the guns, or by changing those on  
 “board for other guns, or by the addition of any equipment for war,  
 “increases or augments, or procures to be increased or augmented, or  
 “is knowingly concerned in increasing or augmenting the warlike  
 “force of any ship which at the time of her being within the dominions  
 “of her Majesty was a ship in the military or naval service of any  
 “foreign state at war with any friendly state,—

Penalty on  
 aiding the  
 warlike  
 equipment  
 of foreign  
 ships.

“Such person shall be guilty of an offence against this Act, and  
 “shall be punishable by fine and imprisonment, or either of  
 “such punishments, at the discretion of the court before which

- “the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.”
- Penalty on fitting out naval or military expeditions without licence. “11. If any person within the limits of her Majesty’s dominions, and without the licence of her Majesty,—  
“Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:  
“(1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.  
“(2.) All ships and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to her Majesty.
- Punishment of accessories. Limitation of term of imprisonment. “12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.  
“13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

*“Illegal Prize.”*

- Illegal prize brought into British ports restored. “14. If, during the continuance of any war in which her Majesty may be neutral, any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of her Majesty’s dominions by the captor or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorized in that behalf by the Government of the foreign state to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the court shall, on due proof of the facts, order such prize to be restored.  
“Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal, as in case of any order made in the exercise of the ordinary jurisdiction of such court; and in the meantime and until a final order has been made on such application the court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandise, and (if the same be of perishable nature, or incurring risk of deterioration) for the

- “sale thereof, and with respect to the deposit or investment of the
- “proceeds of any such sale, as may be made by such court in the
- “exercise of its ordinary jurisdiction.

*“General Provision.*

- “15. For the purposes of this Act, a licence by her Majesty shall
- “be under the sign manual of her Majesty, or be signified by Order
- “in Council or by proclamation of her Majesty.

Licence by  
her Ma-  
jesty, how  
granted.

• *“Legal Procedure.*

- “16. Any offence against this Act shall, for all purposes of and
- “incidental to the trial and punishment of any person guilty of any
- “such offence, be deemed to have been committed either in the place
- “in which the offence was wholly or partly committed, or in any
- “place within her Majesty's dominions in which the person who
- “committed such offence may be.

Jurisdic-  
tion in  
respect of  
offences by  
persons  
against  
Act.

- “17. Any offence against this Act may be described in any indict-  
“ment or other document relating to such offence, in cases where
- “the mode of trial requires such a description, as having been com-  
“mitted at the place where it was wholly or partly committed or
- “it may be averred generally to have been committed within her
- “Majesty's dominions, and the venue or local description in the
- “margin may be that of the county, city, or place in which the trial
- “is held.

Venue in  
respect of  
offences by  
persons.

24 & 25  
Vict. c. 97.

- “18. The following authorities, that is to say, in the United
- “Kingdom any judge of a superior court, in any other place within
- “the jurisdiction of any British court of justice, such court, or, if
- “there are more courts than one, the court having the highest
- “criminal jurisdiction in that place, may, by warrant or instrument
- “in the nature of a warrant in this section included in the term
- “‘warrant,’ direct that any offender charged with an offence against
- “this Act shall be removed to some other place in her Majesty's
- “dominions for trial in cases where it appears to the authority
- “granting the warrant that the removal of such offender would be
- “conducive to the interests of justice, and any prisoner so removed
- “shall be triable at the place to which he is removed, in the same
- “manner as if his offence had been committed at such place.

Power to  
remove  
offenders  
for trial.

- “Any warrant for the purposes of this section may be addressed
- “to the master of any ship or to any other person or persons, and
- “the person or persons to whom such warrant is addressed shall
- “have power to convey the prisoner therein named to any place or
- “places named in such warrant, and to deliver him, when arrived
- “at such place or places, into the custody of any authority de-  
“signated by such warrant.

- “Every prisoner shall, during the time of his removal under any
- “such warrant as aforesaid, be deemed to be in the legal custody of
- “the person or persons empowered to remove him.

- “19. All proceedings for the condemnation and forfeiture of a



Jurisdiction in respect of forfeiture of ships for offences against Act.

Regulations as to proceedings against the offender and against the ship.

Officers authorized to seize offending ships.

Powers of officers authorized to seize ships.

"ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act, shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court; and the Court of Admiralty shall, in addition to any power given to the court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

"20. Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

"21. The following officers, that is to say,—

"(1.) Any officer of customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs, or any officer of the Board of Trade, subject nevertheless to any special or general instructions from the Board of Trade;

"(2.) Any officer of customs or public officer in any British possession, subject nevertheless to any special or general instructions from the governor of such possession;

"(3.) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer;

"(4.) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer,

"may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the 'local authority;' but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

"22. Any officer authorized to seize or detain any ship in respect of any offence against this Act may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of her Majesty's army or navy or marines, or any excise officers or officers of customs, or any harbour-master

"or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same, and to enforce the provisions of this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as well against the Queen's Majesty, her heirs and successors, as against all persons so killed, maimed, or hurt.

"23. If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner hereinafter mentioned.

Special power of Secretary of State or chief executive authority to detain ship.

"The owner of the ship so detained, or his agent, may apply to the Court of Admiralty for its release, and the court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

"If the applicant establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched, contrary to this Act, the ship shall be released and restored.

"If the applicant fail to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched, contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

"The court may in cases where no proceedings are pending for its condemnation release any ship detained under this section on the owner giving security to the satisfaction of the court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed

“contrary to this Act, or may release the ship without such security  
 “if the Secretary of State or chief executive authority think fit so  
 “to release the same.

“If the court be of opinion that there was not reasonable and  
 “probable cause for the detention, and if no such cause appear in  
 “the course of the proceedings, the court shall have power to de-  
 “clare that the owner is to be indemnified by the payment of costs  
 “and damages in respect of the detention, the amount thereof to be  
 “assessed by the court, and any amount so assessed shall be payable  
 “by the Commissioners of the Treasury out of any moneys legally  
 “applicable for that purpose. The Court of Admiralty shall also  
 “have power to make a like order for the indemnity of the owner,  
 “on the application of such owner to the court, in a summary  
 “way, in cases where the ship is released by the order of the  
 “Secretary of State or the chief executive authority, before any  
 “application is made by the owner or his agent to the court for  
 “such release.

“Nothing in this section contained shall affect any proceedings  
 “instituted or to be instituted for the condemnation of any ship  
 “detained under this section where such ship is liable to forfeiture,  
 “subject to this provision, that if such ship is restored in pursuance  
 “of this section all proceedings for such condemnation shall be  
 “stayed; and where the court declares that the owner is to be  
 “indemnified by the payment of costs and damages for the detainer,  
 “all costs, charges, and expenses incurred by such owner in or about  
 “any proceedings for the condemnation of such ship shall be added  
 “to the costs and damages payable to him in respect of the detention  
 “of the ship.

“Nothing in this section contained shall apply to any foreign  
 “non-commissioned ship despatched from any part of her Majesty’s  
 “dominions after having come within them under stress of weather  
 “or in the course of a peaceful voyage, and upon which ship no  
 “fitting out or equipping of a warlike character has taken place in  
 “this country.

Special  
 power of  
 local au-  
 thority to  
 detain  
 ship.

“24. Where it is represented to any local authority, as defined  
 “by this Act, and such local authority believes the representation,  
 “that there is a reasonable and probable cause for believing that a  
 “ship within her Majesty’s dominions has been or is being built,  
 “commissioned, or equipped contrary to this Act, and is about to  
 “be taken beyond the limits of such dominions, or that a ship is about  
 “to be despatched contrary to this Act, it shall be the duty of such  
 “local authority to detain such ship, and forthwith to communicate  
 “the fact of such detention to the Secretary of State or chief execu-  
 “tive authority.

“Upon the receipt of such communication the Secretary of State  
 “or chief executive authority may order the ship to be released if  
 “he thinks there is no cause for detaining her, but if satisfied that  
 “there is reasonable and probable cause for believing that such  
 “ship was built, commissioned, or equipped or intended to be

"despatched in contravention of this Act, he shall issue his warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

"Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner as he is entitled to be indemnified where the Secretary of State having issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the court for such release.

"25. The Secretary of State or the chief executive authority may, by warrant, empower any person to enter any dockyard or other place within her Majesty's dominions and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign state at war with a friendly state, and to search such ship.

"26. Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of her Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say,—

"(1.) In Ireland by the Lord Lieutenant or other the chief governor or governors of Ireland for the time being, or the chief secretary to the Lord Lieutenant:

"(2.) In Jersey by the Lieutenant-Governor:

"(3.) In Guernsey, Alderney, and Sark, and the dependent islands by the Lieutenant-Governor.

"(4.) In the Isle of Man by the Lieutenant-Governor:

"(5.) In any British possession by the Governor.

"A copy of any warrant issued by a Secretary of State or by any officer authorized in pursuance of this Act to issue such warrant in Ireland, the Channel Islands, or the Isle of Man shall be laid before Parliament.

"27. An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the court as a Court of Admiralty.

"28. Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a ship by the Court of Admiralty no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

Power of Secretary of State or chief executive authority to grant search warrant.

Exercise of powers of Secretary of State or chief executive authority.

Appeal from Court of Admiralty.

Indemnity to officers.

Indemnity to Secretary of State or chief executive authority. "29. The Secretary of State shall not, nor shall the chief executive authority be responsible in any action or other legal proceedings" "whatsoever for any warrant issued by him in pursuance of this" "Act, or be examinable as a witness, except at his own request, in" "any court of justice in respect of the circumstances which led to" "the issue of the warrant.

*" Interpretation Clause.*

Interpretation of terms. "30. In this Act, if not inconsistent with the context, the following" "terms have the meanings hereinafter respectively assigned to" "them; that is to say,—

"Foreign State:" " 'Foreign state' includes any foreign prince, colony, province," "or part of any province or people, or any person or persons" "exercising or assuming to exercise the powers of government" "in or over any foreign country, colony, province or part of" "any province or people:

"Military service:" " 'Military service' shall include military telegraphy and any" "other employment whatever, in or in connection with any" "military operation:

"Naval service:" " 'Naval service' shall, as respects a person, include service as" "a marine, employment as a pilot in piloting or directing the" "course of a ship of war or other ship when such ship of war" "or other ship is being used in any military or naval operation," "and any employment whatever on board a ship of war, trans-  
"port, store ship, privateer or ship under letters of marque;" "and as respects a ship, include any user of a ship as a trans-  
"port, store ship, privateer or ship under letters of marque:

"United Kingdom:" " 'United Kingdom' includes the Isle of Man, the Channel" "Islands, and other adjacent islands:

"British possession:" " 'British possession' means any territory, colony, or place being" "part of her Majesty's dominions, and not part of the United" "Kingdom, as defined by this Act:

"The Secretary of State:" " 'The Secretary of State' shall mean any one of her Majesty's" "Principal Secretaries of State:

"Governor:" " 'The Governor' shall as respects India mean the Governor-  
"General or the governor of any presidency, and where a  
"British possession consists of several constituent colonies,  
"mean the Governor-General of the whole possession or the  
"Governor of any of the constituent colonies, and as respects  
"any other British possession it shall mean the officer for the  
"time being administering the government of such possession;" "also any person acting for or in the capacity of a Governor" "shall be included under the term 'Governor':

"Court of Admiralty:" " 'Court of Admiralty' shall mean the High Court of Admiralty" "of England or Ireland, the Court of Session of Scotland, or any" "Vice-Admiralty Court within her Majesty's dominions:

"Ship:" " 'Ship' shall include any description of boat, vessel, floating" "battery, or floating craft; also any description of boat,

- "vessel or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water :
- "'Building' in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly :
- "'Equipping' in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly :
- "'Ship and equipment' shall include a ship and everything in or belonging to a ship :
- "'Master' shall include any person having the charge or command of a ship.
- "Build-  
ing :"
- "Equip-  
ping :"
- "Ship and  
equip-  
ment :"
- "Master."

*"Repeal of Acts, and Saving Clauses.*

"31. From and after the commencement of this Act, an Act passed in the fifty-ninth year of the reign of his late Majesty King George the Third, chapter sixty-nine, intituled 'An Act to prevent the enlisting or engagement of his Majesty's subjects to serve in foreign service, and the fitting out or equipping, in his Majesty's dominions, vessels for warlike purposes, without his Majesty's licence,' shall be repealed: provided that such repeal shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, nor the institution of any investigation or legal proceeding, or any other remedy for enforcing any such penalty, forfeiture, or punishment as aforesaid.

Repeal of  
Foreign  
Enlist-  
ment Act,  
59 G. 3,  
c. 69.

"32. Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state, or give to any British court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign state any jurisdiction which it would not have had if this Act had not passed.

Saving as  
to commis-  
sioned  
foreign  
ships.

"33. Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or licence as is for the time being required by law in the case of subjects of her Majesty entering into the military service of princes, states, or potentates in Asia."

Penalties  
not to ex-  
tend to  
persons  
entering  
into mili-  
tary ser-  
vice in  
Asia.  
59 G. 3, c.  
69, s. 12.

## APPENDIX VII. PAGE 459.

(Extract from *Ortolan, Diplomatie de la Mer*, t. ii. p. 441.)

*"Avis du Conseil d'Etat sur la Compétence en matière de Délits  
"commis à bord des Vaisseaux neutres, dans les Ports et Rades  
"de France. [20 novembre 1806.]*

"Le Conseil d'Etat qui, d'après le renvoi à lui fait par sa Majesté, a entendu le rapport de la section de législation sur celui du grand-juge ministre de la justice, tendant à régler les limites de la juridiction que les Consuls des Etats-Unis d'Amérique, aux ports de Marseille et d'Anvers, réclament, par rapport aux délits commis à bord des vaisseaux de leur nation, étant dans les ports et rades de France;—Considérant qu'un vaisseau neutre ne peut être indéfiniment considéré comme lieu neutre, et que la protection qui lui est accordée dans les ports français ne saurait dessaisir à la juridiction territoriale, pour tout ce qui touche aux intérêts de l'Etat;—Qu'ainsi, le vaisseau neutre admis dans un port de l'Etat, est de plein droit soumis aux lois de police qui régissent le lieu où il est reçu;—Que les gens de son équipage sont également justiciables des tribunaux du pays pour les délits qu'ils y commettraient, même à bord, envers des personnes étrangères à l'équipage, ainsi que pour les Conventions civiles qu'ils pourraient faire avec elles;—Mais, que si jusque-là, la juridiction territoriale est hors de doute, il n'en est pas ainsi à l'égard des délits qui se commettent à bord du vaisseau neutre, de la part d'un homme de l'équipage;—Qu'en ce cas, les droits de la Puissance neutre doivent être respectés, comme s'agissant de la discipline intérieure du vaisseau, dans laquelle l'autorité locale ne doit pas s'ingérer, toutes les fois que son secours n'est pas réclamé, ou que la tranquillité du port n'est pas compromise;—Est d'avis que cette distinction, indiquée par le rapport du grand-juge et conforme à l'usage, est la seule règle qu'il convienne de suivre en cette matière;—Et appliquant cette doctrine aux deux espèces particulières pour lesquelles ont réclaté les Consuls des Etats-Unis;—Considérant que dans l'une de ces affaires, il s'agit d'une rixe passée dans le canot du navire américain *La Newton*, entre deux matelots du même navire, et dans l'autre d'une blessure grave faite par le capitaine en second du navire *La Sally*, à l'un de ses matelots, pour avoir disposé du canot sans son ordre;

"Est d'avis qu'il y a lieu d'accueillir la réclamation, et d'interdire aux tribunaux français la connaissance des deux affaires précitées."

"15 Vict. c. 26.—*An Act to enable her Majesty to carry into effect Arrangements made with Foreign Powers for the Apprehension of Seamen who desert from their Ships.* [17th June, 1852.]

"Whereas arrangements have been made with certain foreign Powers for the recovery of seamen deserting from the ships of such Powers when in British ports, and for the recovery of seamen deserting from British ships when in the ports of such Powers; and whereas it is expedient to enable her Majesty to carry such arrangements into effect, and likewise to enable her Majesty to carry into effect any similar arrangements of a like nature which may be made hereafter: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

"1. Whenever it is made to appear to her Majesty that due facilities are or will be given for recovering and apprehending seamen who desert from British merchant ships in the territories of any foreign Power, her Majesty may, by Order in Council stating that such facilities are or will be given, declare that seamen, not being slaves, who desert from merchant ships belonging to a subject of such Power, when within her Majesty's dominions or the territories of the East India Company, shall be liable to be apprehended and carried on board their respective ships, and may limit the operation of such Order, and may render the operation thereof subject to such conditions and qualifications, if any, as may be deemed expedient.

Her Majesty may by Order in Council declare that deserters from foreign ships may be apprehended and given up.

"2. Upon such publication as hereinafter mentioned of any such Order in Council, then, during such time as the same remains in force, and subject to such limitations and qualifications, if any, as may be therein contained, every justice of the peace or other officer having jurisdiction in the case of seamen who desert from British merchant ships in her Majesty's dominions or in the territories of the East India Company shall, on application being made by a Consul of the foreign Power to which such Order in Council relates, or his deputy or representative, aid in apprehending any seaman or apprentice who deserts from any merchant ship belonging to a subject of such Power, and may for that purpose, upon complaint on oath duly made, issue his warrant for the apprehension of any such deserter, and, upon due proof of the desertion, order him to be conveyed on board the vessel to which he belongs, or to be delivered to the master or mate of such vessel, or to the owner of such vessel or his agent, to be so conveyed; and thereupon it shall be lawful for the person ordered to convey such deserter, or for the master or mate of

Upon publication of Order in Council justices shall aid in recovering deserters from the ships of foreign Powers, and may apprehend them, and send them on board.



Penalty on persons harbouring such deserters.

Orders to be published in the *London Gazette*.  
Orders may be revoked or altered.  
Short title.

'such vessel, or the owner or his agent (as the case may require), to convey him on board accordingly.

"3. If any person protects or harbours any deserter who is liable to be apprehended under this Act, knowing or having reason to believe that he has deserted, such person shall for every offence be liable to a penalty not exceeding ten pounds, and every such penalty shall be recovered, paid, and applied in the same manner as penalties for harbouring or protecting deserters from British merchant ships.

"4. Every Order in Council to be made under the authority of this Act shall be published in the *London Gazette* as soon as may be after the making thereof.

"5. Her Majesty may by Order in Council from time to time revoke or alter any Order in Council previously made under the authority of this Act.

"6. This Act may be cited as the 'Foreign Deserters Act, 1852.'

## APPENDIX VIII. PAGE 527.

'33 & 34 Vict. c. 52.—*An Act for amending the Law relating to the Extradition of Criminals.* [August 9, 1870.]

"Whereas it is expedient to amend the law relating to the surrender to foreign states of persons accused or convicted of the commission of certain crimes within the jurisdiction of such states, and to the trial of criminals surrendered by foreign states to this country :

"Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

### " Preliminary.

Short title.  
Where arrangement for surrender of criminals made,  
Order in Council to apply Act.

"1. This Act may be cited as 'The Extradition Act, 1870.'

"2. Where an arrangement has been made with any foreign state with respect to the surrender to such State of any fugitive criminals, her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

"Her Majesty may, by the same or any subsequent Order, limit the operation of the Order, and restrict the same to fugitive criminals who are in or suspected of being in the part of her Majesty's dominions specified in the Order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

"Every such Order shall recite or embody the terms of the

"arrangement, and shall not remain in force for any longer period than the arrangement.

"Every such Order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the *London Gazette*.

"3. The following restrictions shall be observed with respect to the surrender of fugitive criminals :

Restrictions on surrender of criminals.

"(1.) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of  
 "a political character, or if he prove to the satisfaction of  
 "the police magistrate or the court before whom he is  
 "brought on Habeas corpus, or to the Secretary of State,  
 "that the requisition for his surrender has in fact been  
 "made with a view to try or punish him for an offence  
 "of a political character :

"(2.) A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that State,  
 "or by arrangement, that the fugitive criminal shall not,  
 "until he has been restored or had an opportunity of  
 "returning to her Majesty's dominions, be detained or  
 "tried in that foreign state for any offence committed  
 "prior to his surrender other than the extradition crime  
 "proved by the facts on which the surrender is grounded :

"(3.) A fugitive criminal who has been accused of some offence within English jurisdiction, not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise :

"(4.) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

"4. An Order in Council for applying this Act in the case of any foreign state shall not be made unless the arrangement—

Provisions of arrangement for surrender.

"(1.) provides for the determination of it by either party to it  
 "after the expiration of a notice not exceeding one year ;  
 "and,

"(2.) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act.

"5. When an Order applying this Act in the case of any foreign State has been published in the *London Gazette*, this Act (after the date specified in the Order, or, if no date is specified, after the date of the publication) shall, so long as the Order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any, contained in the Order, apply

Publication and effect of Order.

"in the case of such foreign state. An Order in Council shall be  
 "conclusive evidence that the arrangement therein referred to  
 "complies with the requisitions of this Act, and that this Act  
 "applies in the case of the foreign state mentioned in the Order,  
 "and the validity of such Order shall not be questioned in any legal  
 "proceedings whatever.

Liability of  
 criminal to  
 to surren-  
 der.

"6. Where this Act applies in the case of any foreign state, every  
 "fugitive criminal of that state who is in or suspected of being in  
 "any part of her Majesty's dominions, or that part which is specified  
 "in the Order applying this Act (as the case may be), shall be liable  
 "to be apprehended and surrendered in manner provided by this  
 "Act, whether the crime in respect of which the surrender is sought  
 "was committed before or after the date of the Order, and whether  
 "there is or is not any concurrent jurisdiction in any court of her  
 "Majesty's dominions over that crime.

Order of  
 Secretary  
 of State for  
 issue of  
 warrant in  
 United  
 Kingdom  
 if crime is  
 not of a  
 political  
 character.

"7. A requisition for the surrender of a fugitive criminal of any  
 "foreign state, who is in or suspected of being in the United King-  
 "dom, shall be made to a Secretary of State by some person recog-  
 "nized by the Secretary of State as a diplomatic representative of  
 "that foreign state. A Secretary of State may, by order under his  
 "hand and seal, signify to a police magistrate that such requisition  
 "has been made, and require him to issue his warrant for the  
 "apprehension of the fugitive criminal.

"If the Secretary of State is of opinion that the offence is one of  
 "a political character, he may, if he think fit, refuse to send any  
 "such order, and may also at any time order a fugitive criminal  
 "accused or convicted of such offence to be discharged from custody.

Issue of  
 warrant by  
 police ma-  
 gistrate,  
 justice, &c.

"8. A warrant for the apprehension of a fugitive criminal, whether  
 "accused or convicted of crime, who is in or suspected of being in  
 "the United Kingdom, may be issued—

"1. by a police magistrate on the receipt of the said order of the  
 "Secretary of State, and on such evidence as would in his  
 "opinion justify the issue of the warrant if the crime had  
 "been committed or the criminal convicted in England;  
 "and

"2. by a police magistrate or any justice of the peace in any part  
 "of the United Kingdom, on such information or com-  
 "plaint and such evidence or after such proceedings as  
 "would in the opinion of the person issuing the warrant  
 "justify the issue of a warrant if the crime had been com-  
 "mitted or the criminal convicted in that part of the  
 "United Kingdom in which he exercises jurisdiction.

"Any person issuing a warrant under this section without an order  
 "from a Secretary of State shall forthwith send a report of the fact  
 "of such issue, together with the evidence and information or com-  
 "plaint, or certified copies thereof, to a Secretary of State, who may  
 "if he think fit order the warrant to be cancelled, and the person  
 "who has been apprehended on the warrant to be discharged.

"A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought and the prisoner shall accordingly be brought before a police magistrate.

"A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal.

"9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

Hearing of case and evidence of political character of crime.

"The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

"10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

Committal or discharge of prisoner.

"In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

"If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

"11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of Habeas corpus.

Surrender of fugitive to foreign State by warrant of Secretary of State.

"Upon the expiration of the said fifteen days, or, if a writ of Habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period

“as may be allowed in either case by a Secretary of State, it shall  
 “be lawful for a Secretary of State, by warrant under his hand and  
 “seal, to order the fugitive criminal (if not delivered on the  
 “decision of the court) to be surrendered to such person as may in  
 “his opinion be duly authorized to receive the fugitive criminal by  
 “the foreign state from which the requisition for the surrender  
 “proceeded, and such fugitive criminal shall be surrendered ac-  
 “cordingly.

“It shall be lawful for any person to whom such warrant is di-  
 “rected and for the person so authorized as aforesaid to receive,  
 “hold in custody, and convey within the jurisdiction of such foreign  
 “state the criminal mentioned in the warrant; and if the criminal  
 “escapes out of any custody to which he may be delivered on or in  
 “pursuance of such warrant, it shall be lawful to retake him in the  
 “same manner as any person accused of any crime against the laws  
 “of that part of her Majesty's dominions to which he escapes may  
 “be retaken upon an escape.

Discharge  
of persons  
appre-  
hended if  
not con-  
veyed out  
of United  
Kingdom  
within two  
months.

“12. If the fugitive criminal who has been committed to prison  
 “is not surrendered and conveyed out of the United Kingdom  
 “within two months after such committal, or, if a writ of Habeas  
 “corpus is issued, after the decision of the court upon the return to  
 “the writ, it shall be lawful for any judge of one of her Majesty's  
 “Superior Courts at Westminster, upon application made to him by  
 “or on behalf of the criminal, and upon proof that reasonable notice  
 “of the intention to make such application has been given to a  
 “Secretary of State, to order the criminal to be discharged out of  
 “custody, unless sufficient cause is shown to the contrary.

Execution  
of warrant  
of police  
magis-  
trate.

“13. The warrant of the police magistrate issued in pursuance  
 “of this Act may be executed in any part of the United Kingdom  
 “in the same manner as if the same had been originally issued or  
 “subsequently indorsed by a justice of the peace having jurisdiction  
 “in the place where the same is executed.

Deposi-  
tions to be  
evidence.  
6 & 7 Vict.  
c. 76.

“14. Depositions or statements on oath, taken in a foreign State,  
 “and copies of such original depositions or statements, and foreign  
 “certificates of or judicial documents stating the fact of conviction,  
 “may, if duly authenticated, be received in evidence in proceedings  
 “under this Act.

Authenti-  
cation of  
deposi-  
tions and  
warrants.  
29 & 30  
Vict. c.  
121.

“15. Foreign warrants and depositions or statements on oath, and  
 “copies thereof, and certificates of or judicial documents stating the  
 “fact of a conviction, shall be deemed duly authenticated for the  
 “purposes of this act if authenticated in manner provided for the  
 “time being by law or authenticated as follows:—

“(1.) If the warrant purports to be signed by a judge, magis-  
 “trate, or officer of the foreign state where the same was  
 “issued;

“(2.) If the depositions or statements or the copies thereof pur-  
 “port to be certified under the hand of a judge, magis-  
 “trate, or officer of the foreign state where the same

“were taken to be the original depositions or statements,  
 “or to be true copies thereof, as the case may require; and  
 “(3.) If the certificate of or judicial document stating the fact of  
 “conviction purports to be certified by a judge, magis-  
 “trate, or officer of the foreign state where the conviction  
 “took place; and

“if in every case the warrants, depositions, statements, copies,  
 “certificates, and judicial documents (as the case may be) are  
 “authenticated by the oath of some witness or by being sealed with  
 “the official seal of the minister of justice, or some other minister of  
 “state; and all courts of justice, justices, and magistrates shall take  
 “judicial notice of such official seal, and shall admit the document  
 “so authenticated by it to be received in evidence without further  
 “proof.

“*Crimes committed at Sea.*

“16. Where the crime in respect of which the surrender of a  
 “fugitive criminal is sought was committed on board any vessel on  
 “the high seas which comes into any port of the United Kingdom,  
 “the following provisions shall have effect:

Jurisdic-  
 tion as to  
 crimes  
 committed  
 at sea.

“1. This Act shall be construed as if any stipendiary magistrate  
 “in England or Ireland, and any sheriff or sheriff substi-  
 “tute in Scotland, were substituted for the police magis-  
 “trate throughout this Act, except the part relating to the  
 “execution of the warrant of the police magistrate:

“2. The criminal may be committed to any prison to which the  
 “person committing him has power to commit persons  
 “accused of the like crime:

“3. If the fugitive criminal is apprehended on a warrant issued  
 “without the order of a Secretary of State, he shall be  
 “brought before the stipendiary magistrate, sheriff, or  
 “sheriff substitute who issued the warrant, or who has  
 “jurisdiction in the port where the vessel lies or in the  
 “place nearest to that port.

“*Fugitive Criminals in British Possessions.*

“17. This Act when applied by Order in Council shall, unless it  
 “is otherwise provided by such Order, extend to every British pos-  
 “session in the same manner as if throughout this Act the British  
 “possession were substituted for the United Kingdom or England,  
 “as the case may require, but with the following modifications;  
 “namely,

Proceed-  
 ings as to  
 fugitive  
 criminals  
 in British  
 posses-  
 sions.

“(1.) The requisition for the surrender of a fugitive criminal who  
 “is in or suspected of being in a British possession may  
 “be made to the governor of that British possession by  
 “any person recognized by that governor as a consul-  
 “general, consul, or vice-consul, or (if the fugitive cri-  
 “minal has escaped from a colony or dependency of the

"foreign state on behalf of which the requisition is made)  
 "as the governor of such colony or dependency :

"2. No warrant of a Secretary of State shall be required, and  
 "all powers vested in or acts authorized or required to be  
 "done under this Act by the police magistrate and the  
 "Secretary of State, or either of them, in relation to the  
 "surrender of a fugitive criminal, may be done by the  
 "governor of the British possession alone :

"(3.) Any prison in the British possession may be substituted  
 "for a prison in Middlesex :

"(4.) A judge of any court exercising in the British possession  
 "the like powers as the court of Queen's Bench exercises  
 "in England may exercise the power of discharging a  
 "criminal when not conveyed within two months out of  
 "such British possession.

Saving of  
 laws of  
 British  
 posses-  
 sions.

"18. If by any law or ordinance, made before or after the passing  
 "of this Act by the Legislature of any British possession, provision  
 "is made for carrying into effect within such possession the surrender  
 "of fugitive criminals who are in or suspected of being in such Bri-  
 "tish possession, her Majesty may, by the Order in Council apply-  
 "ing this Act in the case of any foreign state, or by any subsequent  
 "Order, either

"suspend the operation within any such British possession of this  
 "Act, or of any part thereof, so far as it relates to such  
 "foreign state, and so long as such law or ordinance con-  
 "tinues in force there, and no longer ;

"or direct that such law or ordinance, or any part thereof, shall  
 "have effect in such British possession, with or without  
 "modifications and alterations, as if it were part of this Act.

#### "General Provisions.

Criminal  
 surren-  
 dered by  
 foreign  
 State not  
 triable for  
 previous  
 crime.

"19. Where, in pursuance of any arrangement with a foreign  
 "state, any person accused or convicted of any crime which, if com-  
 "mitted in England, would be one of the crimes described in the  
 "first schedule to this Act, is surrendered by that foreign state, such  
 "person shall not, until he has been restored or had an opportunity  
 "of returning to such foreign state, be triable or tried for any offence  
 "committed prior to the surrender in any part of her Majesty's  
 "dominions other than such of the said crimes as may be proved by  
 "the facts on which the surrender is grounded.

As to use  
 of forms in  
 second  
 schedule.

"20. The forms set forth in the second schedule to this Act, or  
 "forms as near thereto as circumstances admit, may be used in all  
 "matters to which such forms refer, and in the case of a British  
 "possession may be so used, *mutatis mutandis*, and when used shall  
 "be deemed to be valid and sufficient in law.

Revoca-  
 tion, &c.,  
 of Order in  
 Council.

"21. Her Majesty may, by Order in Council, revoke or alter,  
 "subject to the restrictions of this Act, any Order in Council made  
 "in pursuance of this Act, and all the provisions of this Act with

"respect to the original Order shall (so far as applicable) apply,  
 "mutatis mutandis, to any such new Order.

"22. This Act (except so far as relates to the execution of  
 "warrants in the Channel Islands) shall extend to the Channel  
 "Islands and the Isle of Man in the same manner as if they were part  
 "of the United Kingdom; and the royal courts of the Channel  
 "Islands are hereby respectively authorized and required to register  
 "this Act.

Applica-  
 tion of Act  
 in Channel  
 Islands  
 and Isle of  
 Man.

"23. Nothing in this Act shall affect the lawful powers of her  
 "Majesty or of the Governor-General of India in Council to make  
 "treaties for the extradition of criminals with Indian native states,  
 "or with other Asiatic states conterminous with British India, or to  
 "carry into execution the provisions of any such treaties made either  
 "before or after the passing of this Act.

Saving for  
 Indian  
 treaties.

"24. The testimony of any witness may be obtained in relation  
 "to any criminal matter pending in any court or tribunal in a foreign  
 "state in like manner as it may be obtained in relation to any civil  
 "matter under the Act of the session of the nineteenth and twen-  
 "tieth years of the reign of her present Majesty, chapter one  
 "hundred and thirteen, intituled 'An Act to provide for taking  
 "evidence in her Majesty's dominions in relation to civil and  
 "commercial matters pending before foreign tribunals;' and all  
 "the provisions of that Act shall be construed as if the term civil  
 "matter included a criminal matter, and the term cause included  
 "a proceeding against a criminal: provided that nothing in this  
 "section shall apply in the case of any criminal matter of a political  
 "character.

Power of  
 foreign  
 state to  
 obtain  
 evidence  
 in United  
 Kingdom.

"25. For the purposes of this Act, every colony, dependency, and  
 "constituent part of a foreign state, and every vessel of that state,  
 "shall (except where expressly mentioned as distinct in this Act) be  
 "deemed to be within the jurisdiction of and to be part of such  
 "foreign state.

Foreign  
 state in-  
 cludes  
 dependen-  
 cies.

"26. In this Act, unless the context otherwise requires,—

Definition  
 of terms.  
 "British  
 posses-  
 sion : "

"The term 'British possession' means any colony, plantation  
 "island, territory, or settlement within her Majesty's dominions,  
 "and not within the United Kingdom, the Channel Islands,  
 "and Isle of Man; and all colonies, plantations, islands, terri-  
 "tories, and settlements under one legislature, as hereinafter  
 "defined, are deemed to be one British possession :

"The term 'legislature' means any person or persons who can  
 "exercise legislative authority in a British possession, and  
 "where there are local legislatures as well as a central legisla-  
 "ture, means the central legislature only :

"Legisla-  
 ture : "

"The term 'governor' means any person or persons administering  
 "the government of a British possession, and includes the  
 "governor of any part of India :

"Govern-  
 nor : "

"The term 'extradition crime' means a crime which, if com-  
 "mitted in England or within English jurisdiction, would

"Extra-  
 dition  
 crime : "



- "be one of the crimes described in the first schedule to this Act:
- "Conviction:" "The terms 'conviction' and 'convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term 'accused person' includes a person so convicted for contumacy:
- "Fugitive criminal:" "The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of her Majesty's dominions; and the term 'fugitive criminal of a foreign state' means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state:
- "Fugitive criminal of a foreign state:" "The term 'Secretary of State' means one of her Majesty's Principal Secretaries of State:
- "Secretary of State:" "The term 'police magistrate' means a chief magistrate of the metropolitan police courts, or one of the other magistrates of the metropolitan police court in Bow Street:
- "Police magistrate:" "The term 'justice of the peace' includes in Scotland any sheriff, sheriff's substitute, or magistrate:
- "Justice of the peace:" "The term 'warrant,' in the case of any foreign state, includes any judicial document authorizing the arrest of a person accused or convicted of crime.
- "Warrant."

#### *"Repeal of Acts.*

- Repeal of Acts in third schedule. "27. The Acts specified in the third schedule to this Act are hereby repealed as to the whole of her Majesty's dominions; and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign states with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such Order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act.
- "Provided that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said Acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this Act had not passed."

# “SCHEDULES.

## “FIRST SCHEDULE.

### “LIST OF CRIMES.

“The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

“Murder, and attempt and conspiracy to murder.

“Manslaughter.

“Counterfeiting and altering money, and uttering counterfeit or altered money.

“Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.

“Embezzlement and larceny.

“Obtaining money or goods by false pretences.

“Crimes by bankrupts against bankruptcy law.

“Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force.

“Rape.

“Abduction.

“Child stealing.

“Burglary and housebreaking.

“Arson.

“Robbery with violence.

“Threats by letter or otherwise with intent to extort.

“Piracy by law of nations.

“Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

“Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

“Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.”

The second Schedule contains forms of Orders and Warrants, and the third a list of repealed Acts.

“36 & 37. Vict. c. 60.—*An Act to amend the Extradition Act, 1870.*  
[5th August 1873.]

“Be it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

“1. This Act shall be construed as one with the Extradition Act, 1870, (in this Act referred to as the principal Act,) and the principal Act and this Act may be cited together as the Extradition Acts, 1870 and 1873, and this Act may be cited alone as the Extradition Act, 1873.

Construction of Act and short title.  
33 & 34  
Vict. c. 52.

Explan-  
ation of  
sect. 6 of  
33 & 34  
Vict. c. 52.

"2. Whereas by section six of the principal Act it is enacted as follows :

" 'Where this Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of her Majesty's dominions, or that part which is specified in the Order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the Order, and whether there is or is not any concurrent jurisdiction in any court of her Majesty's dominions over that crime.'

"And whereas doubts have arisen as to the application of the said section to crimes committed before the passing of the principal Act, and it is expedient to remove such doubts, it is therefore hereby declared that—

"A crime committed before the date of the Order includes in the said section a crime committed before the passing of the principal Act, and the principal Act and this Act shall be construed accordingly.

Liability  
of access-  
ories to be  
surren-  
dered.

"3. Whereas a person who is accessory before or after the fact, or counsels, procures, commands, aids, or abets the commission of any indictable offence, is by English law liable to be tried and punished as if he were the principal offender, but doubts have arisen whether such person as well as the principal offender can be surrendered under the principal Act, and it is expedient to remove such doubts; it is therefore hereby declared that—

"Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any Extradition crime, or of being accessory before or after the fact to any Extradition crime, shall be deemed for the purposes of the principal Act and this Act to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly.

Explan-  
ation of  
sect. 14 of  
33 & 34  
Vict. c. 52,  
as to state-  
ments on  
oath, in-  
cluding  
affirma-  
tions.  
Power of  
taking evi-  
dence in  
United  
Kingdom  
for foreign  
criminal  
matters.

"4. Be it declared, that the provisions of the principal Act relating to depositions and statements on oath taken in a foreign state, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign State, and copies of such affirmations.

"5. A Secretary of State may, by order under his hand and seal, require a police magistrate or a justice of the peace to take evidence for the purposes of any criminal matter pending in any court or tribunal in any foreign state; and the police magistrate or justice of the peace, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken that such evidence was taken before him, and shall transmit the same to the Secretary of State; such evi-

"dence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition.

"Any person may, after payment or tender to him of a reasonable sum for his costs and expenses in this behalf, be compelled, for the purposes of this section, to attend and give evidence and answer questions and produce documents, in like manner and subject to the like conditions as he may in the case of a charge preferred for an indictable offence.

"Every person who wilfully gives false evidence before a police magistrate or justice of the peace under this section shall be guilty of perjury.

"Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

"6. The jurisdiction conferred by section sixteen of the principal Act on a stipendiary magistrate, and a sheriff or sheriff substitute, shall be deemed to be in addition to, and not in derogation or exclusion of, the jurisdiction of the police magistrate.

Explanation of sect. 16 of 33 & 34 Vict. c. 62.

"7. For the purposes of the principal Act and this Act a diplomatic representative of a foreign state shall be deemed to include any person recognized by the Secretary of State as a consul-general of that state, and a consul or vice-consul shall be deemed to include any person recognized by the governor of a British possession as a consular officer of a foreign state.

Explanation of diplomatic representative and consul.

"8. The principal Act shall be construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to this Act.

Addition to list of crimes in schedule.

## " SCHEDULE.

### " LIST OF CRIMES.

"The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

"Kidnapping and false imprisonment.

"Perjury, and subornation of perjury, whether under common or statute law.

"Any indictable offence under the Larceny Act, 1861, or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

24 & 25 Vict. c. 96, &c.

"Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter ninety-seven, 'To consolidate and amend the statute law of England and Ireland relating to malicious injuries to property,' or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

"Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty,

- "chapter ninety-eight, 'To consolidate and amend the statute law of England and Ireland, relating to indictable offences by forgery,' or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.
- "Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter ninety-nine, 'To consolidate and amend the statute law of the United Kingdom against offences relating to the coin,' or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.
- "Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter one hundred, 'To consolidate and amend the statute law of England and Ireland relating to offences against the person,' or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.
- "Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act."

"*Circulaire du Ministre de la Justice de France, relatant les principes en matière d'Extradition.* Paris, le 5 avril 1841.

"MONSIEUR LE PROCUREUR-GÉNÉRAL,—La plupart des Puissances étrangères livrent à la France les malfaiteurs qui ont fui son territoire, et le gouvernement français use de réciprocité. J'ai remarqué que les magistrats ne connaissent pas toujours d'une manière assez précise, les relations qui existent sur ce point entre la France et les autres nations, et que les règles qui régissent cette matière ne leur sont pas assez familières. De là les fautes graves : des coupables ont échappé à la punition qu'ils avaient méritée ; des procédures ont été inutilement suspendues, dans l'espoir d'obtenir une extradition qui ne pouvait être accordée ; enfin les magistrats ne sachant pas sur quels documents les demandes d'extradition doivent être appuyées, ont omis de me transmettre les pièces nécessaires, et des négociations, qui devaient être suivies avec promptitude, ont ainsi été retardées.

"Le but de cette instruction est de vous bien faire connaître les rapports établis entre le gouvernement français et les gouvernements étrangers relativement à l'extradition des malfaiteurs, et de vous indiquer les pièces, les documents qui doivent accompagner la demande d'extradition. Je m'occuperai à la fin de cette circulaire, de l'exécution des commissions rogatoires que les magistrats français adressent à l'étranger, et de celles qui, transmises en France, émanent d'une autorité étrangère.

"§ 1. Le gouvernement du Roi obtient l'extradition d'un Français qui a commis un crime, soit en vertu des Traités intervenus à cet effet, soit par suite de négociations qui ont lieu chaque fois qu'une extradition est demandée.

"La France a conclu des traités d'extradition avec l'Espagne

“(29 septembre, 1765), avec la Suisse (18 juillet, 1828), avec la Belgique (29 novembre, 1834); avec la Sardaigne (23 mai, 1838). Ces traités doivent être étudiés avec d’autant plus de soin que les règles qui y sont tracées s’appliquent aux négociations particulières qui peuvent s’engager avec d’autres Puissances en pareille matière. A l’égard des autres nations, nous sommes avec elles dans les relations qui nous permettent d’en obtenir, par des négociations particulières, la délivrance des malfaiteurs.

“Il faut excepter l’Angleterre et les Etats-Unis d’Amérique. Ces deux Puissances n’accordent pas d’extraditions : la première, parce que sa législation ne le permet pas ; la seconde, parce que la question de savoir si le droit de livrer les criminels appartient à chacun des Etats ou au gouvernement central n’est pas encore vidée ; cette difficulté s’est opposée jusqu’à présent à toute extradition.

“§ 2. L’extradition des malfaiteurs est soumise à des restrictions dont il faut bien se rendre compte. En premier lieu, les Puissances ne consentent pas à livrer leurs nationaux : il en résulte que la France ne peut réclamer que l’extradition d’un Français ou d’un étranger réfugié dans un pays autre que celui auquel il appartient. En second lieu, le fait qui a été commis par l’individu dont on veut obtenir l’extradition doit être puni par la loi d’une peine afflictive ou infamante, et constituer un crime.

“Ce principe a été adopté par la France comme par les autres Puissances étrangères ; il est aussi consacré par les traités que quelques-unes de ces puissances ont faits entre elles. En effet, il faut une raison puissante pour faire rechercher sur la terre étrangère l’homme qui s’est puni par l’éloignement volontaire de sa patrie ; et d’ailleurs, les infractions graves ont toujours un caractère de criminalité absolue, qui rend la répression nécessaire dans l’intérêt de la société tout entière, tandis que les faits qualifiés délits n’ont souvent qu’une criminalité relative, et n’offensent que l’Etat seul dans le sein duquel ils ont été commis.

“C’est une règle dont le gouvernement du Roi n’entend dans aucun cas se départir. Les traités contiennent la liste des crimes pour lesquels l’extradition est accordée ; mais il ne faut pas s’arrêter à cette nomenclature, qui est plutôt indicative que limitative.

“Du principe que l’extradition ne peut être accordée pour délit, il résulte que si un individu qui a commis un fait qualifié crime en France, est livré au gouvernement français pour être jugé sur ce fait, et qu’en même temps il soit prévenu d’un délit, il ne doit pas être jugé sur ce délit. L’application du principe est susceptible de quelques difficultés. Il est évident que, si le délit est isolé, il sera facile de ne juger l’individu livré que sur le crime ; mais, dans certains cas, le délit est connexe ; en outre, il devient souvent, par sa connexité, une circonstance aggravante. Quand ces difficultés se présenteront, vous m’en référerez, et je vous ferai connaître, avec mon avis, les précédents de mon administration.

“L’extradition ne peut être demandée que pour un crime, mais

“ elle ne peut être obtenue pour tous les crimes. Une distinction  
“ doit être établie. Les crimes politiques s’accomplissent dans des  
“ circonstances si difficiles à apprécier, ils naissent de passions si  
“ ardentes, qui souvent sont leur excuse, que la France maintient le  
“ principe que l’extradition ne doit pas avoir lieu pour fait politique.

“ C’est une règle qu’elle met son honneur à soutenir. Elle a  
“ toujours refusé, depuis 1830, de pareilles extraditions, elle n’en  
“ demandera jamais. Quand un Français livré par une Puissance  
“ étrangère, comme auteur d’un crime ordinaire, est en même temps  
“ accusé d’un crime politique, il ne peut être jugé que pour le crime  
“ ordinaire. Immédiatement après le jugement, s’il est acquitté, et  
“ après l’expiration de sa peine, s’il a été condamné, le gouverne-  
“ ment du Roi lui indique, pour sortir de France, un délai, passé lequel,  
“ s’il est trouvé sur le territoire, il est jugé pour le crime politique.

“ Comme les actes d’extradition sont non-seulement personnels à  
“ celui qu’on livre, mais qu’ils énoncent en outre le fait qui donne  
“ lieu à l’extradition, l’individu qu’on a livré ne peut être jugé que  
“ sur ce fait. Si, pendant qu’on procède à l’instruction du crime  
“ pour lequel il est livré, il surgit des preuves d’un nouveau crime  
“ pour lequel l’extradition pourrait être également accordée, il faut  
“ qu’une nouvelle demande soit formée à cet effet. Ces règles me  
“ paraissent suffisantes pour vous mettre à même de trancher la plu-  
“ part de difficultés qui se présenteront à vous; mais dans une  
“ matière si délicate, qui intéresse la paix du royaume, puisqu’il  
“ importe de ne pas troubler les rapports qui existent avec les  
“ Puissances amies, je vous recommande de me consulter souvent.

“ J’ai raisonné jusqu’à présent dans l’hypothèse où les questions  
“ relatives à l’extradition seraient soumises à l’administration, où les  
“ procureurs-généraux s’en trouveraient saisis, comme maîtres de  
“ l’action publique; mais les tribunaux peuvent être appelés inci-  
“ demment à en connaître. Quelle est à cet égard leur compétence?  
“ En principe général, le gouvernement seul est juge de la validité  
“ d’une extradition, et il en résulte qu’il lui appartient d’en fixer la  
“ portée, d’en interpréter les termes. Dès lors, quand on soutient  
“ devant un tribunal, ou qu’une extradition est irrégulière, ou  
“ qu’elle est interprétée dans un sens, soit trop favorable, soit pré-  
“ judiciaire à l’inculpé, le tribunal doit surseoir jusqu’à ce que le  
“ gouvernement ait fait connaître sa décision. C’est ce que la Cour  
“ de cassation a jugé le 29 août, 1840.

“ § 3. Maintenant, quelles sont les pièces qui appuieront la  
“ demande d’extradition; et, en premier lieu, comment cette de-  
“ mande sera-t-elle formée? C’est au gouvernement seul à agir; il  
“ ne vous est pas permis, en cette matière, de vous entendre, sous  
“ aucun prétexte, avec les agents des Puissances étrangères; vous ne  
“ pouvez pas non plus vous adresser directement aux autorités judi-  
“ ciaires des pays voisins, pour obtenir l’extradition. vous pouvez  
“ correspondre seulement avec les magistrats étrangers pour avoir  
“ des renseignements.

“ Les pièces qui doivent être jointes à la demande sont différentes, selon que la procédure contre l'individu, dont on réclame l'extradition, est plus ou moins avancée. Si l'arrêt de la Chambre des mises en accusation est rendu, vous m'enverrez cet arrêt ; s'il y a eu condamnation par contumace ou contradictoire, vous m'adresserez les arrêts de condamnation. Quand l'extradition est demandée au commencement de la procédure, vous me transmettez un mandat d'arrêt. Ce mandat ne peut être remplacé par le mandat d'amener, qui ne contient pas la qualification du fait, et qui est presque toujours décerné avant que ce fait soit bien connu. Le mandat d'arrêt n'est point un acte exécutoire à l'étranger, c'est simplement un document. Je fais cette remarque parce que des juges d'instruction, des officiers du ministère public, ont souvent accompagné les mandats d'invitations, de réquisitions adressées aux autorités étrangères. Cela est contraire au principe qui renferme l'autorité des magistrats dans le territoire. Quelques juges d'instruction saisissent la Chambre du Conseil, pour obtenir une ordonnance qui homologue, pour ainsi dire, le mandat d'arrêt. Cette formalité est surabondante et inutile. Le mandat doit être rédigé avec soin, et la qualification du fait doit y recevoir le développement nécessaire. Ce mandat me sera transmis par vous avec une lettre explicative.

“ Le gouvernement belge consent à faire arrêter l'individu dont l'extradition est demandée sur le vu du mandat d'arrêt ; mais il ne le livre que sur la présentation de l'arrêt de la Chambre des mises en accusation.

“ Le gouvernement espagnol exige aussi la production de l'arrêt de la Chambre des mises en accusation. Cette pièce devra donc m'être transmise après le mandat, quand il s'agira d'un individu réfugié en Belgique ou en Espagne ; l'arrêt me sera transmis assez à temps pour que je puisse le produire dans les trois mois qui auront suivi l'arrestation, en Belgique, du malfaiteur qu'on réclame de cette Puissance ; sinon, aux termes du Traité de 1834, il serait mis en liberté. En général vous suivrez avec célérité les poursuites commencées contre des inculpés dont l'extradition pourra être demandée et obtenue.

“ Lorsque, postérieurement à la demande d'extradition, le fait imputé à celui dont l'extradition est demandée perdra le caractère de crime pour prendre celui de simple délit, vous m'en aviserez immédiatement, pour que la demande soit retirée ou le prévenu rendu à la liberté et conduit hors des frontières, s'il avait été amené en France. Il est inutile de dire que, dans le cas où une ordonnance, un arrêt de non-lieu, une ordonnance d'acquiescement intervient, je dois en être averti sans délai.

“ Quand un individu est livré et amené en France, c'est à l'autorité administrative qu'il doit d'abord être remis ; mais, comme il importe qu'il soit le plus promptement possible à la disposition de l'autorité judiciaire, le procureur-général, dans le ressort duquel il



“ est conduit, le reçoit des mains de l'autorité administrative, et, si  
 “ le jugement ne doit pas être rendu dans son ressort, il s'entend  
 “ immédiatement avec le procureur-général, dans le ressort duquel  
 “ l'accusation doit être purgée, pour que la translation soit opérée.  
 “ L'autorité administrative remet l'ordre de conduite, ou tout autre  
 “ document équivalent, qui suffit pour saisir le procureur-général du  
 “ lieu où est transféré le prévenu.

“ § 4. Je me suis occupé jusqu'ici de l'extradition en ce qui con-  
 “ cerne les individus qui, après avoir commis un crime en France,  
 “ ont fui à l'étranger; mais la France, usant de réciprocité envers  
 “ les Puissances étrangères, consent à leur livrer les malfaiteurs qui  
 “ ont commis des crimes sur leur territoire. Les magistrats sont  
 “ tout à fait étrangers à la négociation qui intervient alors; mais il  
 “ est important que vous sachiez dans quelles limites est renfermée  
 “ l'autorité judiciaire française, quant à l'aide qu'elle peut prêter aux  
 “ autorités du pays étranger où un crime a été commis. Souvent  
 “ des magistrats étrangers transmettent directement aux procureurs-  
 “ généraux, à leurs substituts et même aux tribunaux, des mandats,  
 “ des ordres d'arrestation, des jugements de condamnation. Ces  
 “ mandats, ces jugements ne sont point exécutoires en France, l'ar-  
 “ restation d'un étranger ne peut être opérée qu'en vertu de l'ordon-  
 “ nance du Roi qui ordonne l'extradition. Ces mandats ou juge-  
 “ ments doivent m'être adressés par les magistrats qui les ont reçus,  
 “ pour que je m'entende sur la question d'extradition avec M. le  
 “ Ministre des Affaires étrangères. Vous êtes souvent instruit  
 “ qu'un étranger qui a commis un crime dans son pays se trouve  
 “ dans votre ressort. Si cet étranger est porteur d'un passeport  
 “ falsifié, s'il se livre à la mendicité, au vagabondage, etc., vous ferez  
 “ opérer son arrestation, et vous m'en instruirez immédiatement;  
 “ mais, quand cet étranger n'a commis aucun délit en France, vous  
 “ vous rappelerez que c'est à l'autorité administrative seule à  
 “ prendre les moyens de surveillance, à adopter les mesures de police  
 “ qui peuvent l'empêcher d'échapper aux poursuites commencées  
 “ contre lui hors de France.

“ L'exécution de l'ordonnance d'extradition est confiée aux agents  
 “ de l'ordre administratif. Mais, quand l'étranger que livre la  
 “ France se trouve sous le coup de poursuites dans le royaume,  
 “ et qu'il est écroué en vertu d'un ordre de la justice française, vous  
 “ avez diverses déterminations à prendre.

“ Si l'étranger dont l'extradition est accordée subit une peine en  
 “ France, il ne pourra être livré qu'après que cette peine aura été  
 “ subie. Si des poursuites ont été commencées contre lui, elles  
 “ doivent être mises à fin; s'il est acquitté, l'ordonnance d'extradi-  
 “ tion sera immédiatement exécutée; s'il est condamné, elle ne le  
 “ sera qu'après sa peine subie. Mais c'est dans l'intérêt de la vindicte  
 “ publique seule que l'extradition peut être retardée; l'intérêt par-  
 “ ticulier ne pourrait être écouté, et, en conséquence, un créancier  
 “ qui retient en prison un débiteur étranger dont l'extradition serait

“accordée, ne saurait s’opposer à ce qu’il fût livré à la puissance étrangère qui l’a réclamé. En effet, par suite de l’extradition, l’étranger se trouve sous la main de la justice étrangère, il est complètement à sa disposition, et l’assurance du paiement d’une dette ne peut être mise en balance avec l’utilité qu’il y a à punir un malfaiteur. Si, dans un cas pareil, des créanciers réclamaient auprès de vous, vous n’auriez aucun égard à leurs réclamations, et si, comme il y en a eu des exemples, ils s’adressaient aux tribunaux, vous soutiendriez l’incompétence de l’autorité judiciaire, et vous vous entendriez, au besoin, avec l’autorité administrative pour que le conflit fût élevé. Le Conseil d’Etat a, le 2 juillet, 1836, approuvé un arrêt de conflit rendu dans de semblables circonstances.

“§ 5. Il me reste à vous entretenir de l’exécution des commissions rogatoires qui peuvent être transmises à l’étranger, et aussi de l’exécution de celles qui sont envoyées par les autorités étrangères. Nos relations avec les puissances étrangères sont diverses, relativement à l’exécution des commissions rogatoires émanées des tribunaux français; mais le gouvernement peut obtenir de toutes certains documents, certaines mesures conservatoires.

“Toutes les commissions rogatoires qui devront être exécutées à l’étranger me seront transmises. Dans aucun cas, les magistrats ne correspondront avec les autorités judiciaires à l’étranger, pour la transmission ou l’exécution de ces commissions rogatoires. Si l’on trouve convenable d’y joindre une note explicative, elle me sera adressée, et je la ferai parvenir au gouvernement étranger. Les magistrats français ont fait précéder quelquefois de réquisitions adressées aux magistrats étrangers les commissions rogatoires qui étaient transmises à ceux-ci, cela ne doit point être ainsi. Aucun lien judiciaire n’existe entre les magistrats des deux nations différentes; il est inutile de faire des réquisitions auxquelles il ne peut être obtempéré. Il faut, si l’on juge nécessaire d’employer une formule, se servir d’une formule d’invitation, de prière; et cette formule devra être aussi simple et aussi bref que possible.

“Il y a une exception aux règles qui précèdent: elle est relative à l’exécution des commissions rogatoires dans les Etats de S. M. Sarde. L’article XXII d’un traité conclu à Turin, le 24 mars, 1760, est ainsi conçu: ‘Pour favoriser l’exécution réciproque des décrets et jugements, les cours suprêmes déféreront de part et d’autre à la forme du droit, aux réquisitoires qui leur seront adressés à ces fins, même sous le nom desdites cours.’ Les sénats des diverses provinces, dont se composent les Etats sardes, se fondant sur cette disposition, ne permettent l’envoi en France que des commissions rogatoires qu’ils ont délibérées. Ces commissions rogatoires sont rédigées en leur nom et adressées à la Cour royale dans le ressort de laquelle elles devront être exécutées. Ces mêmes sénats exigent, par réciprocité, que les commissions

“rogatoires, venant de France, quel que soit le magistrat saisi de  
“l’information qui les nécessite, leur soient adressées par la Cour  
“royale du ressort, et ils en subordonnent l’exécution à leur propre  
“autorité. Ainsi, quand une commission rogatoire devra être  
“envoyée dans les États de S. M. Sarde, vous la soumettrez à la  
“Cour royale pour que cette cour en délibère ; et si elle juge con-  
“venable de la transmettre, elle rendra un arrêt portant invitation à  
“l’un des sénats des États de Sardaigne de l’exécuter. C’est par la  
“première chambre civile de la Cour et en Chambre du conseil,  
“que l’arrêt doit être rendu. Vous m’en transmettez ensuite une  
“expédition ; car les corps judiciaires de deux pays étrangers ne  
“doivent pas correspondre entre eux, et l’arrêt de la Cour royale  
“ne sera exécuté qu’en vertu du consentement réciproque des deux  
“gouvernements.

“Le gouvernement français consent à ce que des commissions  
“rogatoires émanées de tribunaux étrangers soient exécutées en  
“France ; mais il veut les examiner avant d’autoriser leur exécution  
“pour s’assurer qu’elles ne contiennent rien de contraire aux lois  
“du royaume. Le magistrat auquel une commission rogatoire est  
“transmise directement de l’étranger—et ce cas est très-fréquent—  
“doit donc me l’envoyer immédiatement pour que je décide s’il y a  
“lieu d’y faire droit. Ces commissions rogatoires seront exécutées  
“par le juge d’instruction, sur la réquisition du ministère public ;  
“les témoins doivent être entendus dans la forme ordinaire ; ils  
“peuvent être contraints par les voies de droit à déposer ; quand le  
“magistrat instructeur aura accompli sa mission, il rendra une  
“ordonnance de *soit remis au parquet*, et vous me transmettez  
“toutes les pièces dans le plus bref délai.

“Telles sont, Monsieur le Procureur-général, les instructions  
“qu’il m’a paru nécessaire de vous transmettre sur la matière de  
“l’extradition. C’est une des parties de l’administration criminelle  
“où il se commet le plus d’erreurs, où j’ai le plus souvent occasion  
“de rappeler les règles aux magistrats. Faites, par vos soins, qu’il  
“n’en soit plus ainsi. Je compte sur votre zèle et vos lumières  
“pour que le service, sur ce point, soit régularisé. Je vous prie de  
“m’accuser réception de la présente circulaire, dont je vous adresse  
“des exemplaires en nombre suffisant pour que vous puissiez en  
“transmettre aux procureurs du roi, aux substituts et aux juges  
“d’instruction de votre ressort.

“Vous voudrez bien considérer comme abrogées les circulaires  
“relatives à l’extradition qui ont été adressées par la Chancellerie à  
“vos prédécesseurs, et notamment celles des 6 octobre, 1810,  
“12 juin, 1816, et 31 juillet, 1821.

“Du 5 avril, 1841.”

## APPENDIX IX. PAGE 601.

TWENTY-FOUR Protocols preceded the signing of the Treaty of Paris. The Twenty-third—often cited on account of “the wish” that an attempt at friendly arbitration should be made before having recourse to war—is as follows:—

(TRANSLATION.)

• “*Protocol No. 23.—Meeting of April 14, 1856.*

“Present: The Plenipotentiaries of Austria, France, Great Britain, Prussia, Russia, Sardinia, Turkey.

“The Protocol of the preceding sitting and its Annex are read and approved.

“Count Walewski remarks that it remains for the Congress to decide upon the draft of Declaration, of which he indicated the bases in the last meeting, and he demands of the Plenipotentiaries who had reserved to themselves to take the orders of their respective Courts in regard to this matter, whether they are authorized to assent to it.

“Count Buol declares that Austria is happy to concur in an Act of which she recognizes the salutary influence, and that he has been furnished with necessary powers to adhere to it.

“Count Orloff expresses himself in the same sense: he adds, however, that, in adopting the proposition made by the first Plenipotentiary of France, his Court cannot bind itself to maintain the principle of the abolition of privateering and to defend it against Powers who might not think proper to accede to it.

“The Plenipotentiaries of Prussia, of Sardinia, and of Turkey, having equally given their assent, the Congress adopts the draft annexed to the present Protocol, and appoints the next meeting for the signature of it.

“The Earl of Clarendon having demanded permission to lay before the Congress a proposition which it appears to him ought to be favourably received, states that the calamities of war are still too present to every mind not to make it desirable to seek out every expedient calculated to prevent their return; that a stipulation had been inserted in Article VII. of the Treaty of Peace, recommending that in case of difference between the Porte and one or more of the other signing Powers, recourse should be had to the mediation of a friendly State before resorting to force.

“The first Plenipotentiary of Great Britain conceives that this happy innovation might receive a more general application, and thus become a barrier against conflicts which frequently only break forth because it is not always possible to enter into explanation and to come to an understanding.

“He proposes, therefore, to agree upon a resolution calculated to afford to the maintenance of peace that chance of duration here-

“after, without prejudice, however, to the independence of Governments.

“Count Walewski declares himself authorized to support the idea expressed by the first Plenipotentiary of Great Britain; he gives the assurance that the Plenipotentiaries of France are wholly disposed to concur in the insertion in the Protocol of a wish which, being fully in accordance with the tendencies of our epoch, would not in any way fetter the free action of Governments.

“Count Buol would not hesitate to concur in the opinion of the Plenipotentiaries of Great Britain and of France, if the Resolution of the Congress is to have the form indicated by Count Walewski, but he could not take, in the name of his Court, an absolute engagement calculated to limit the independence of the Austrian Cabinet.

“The Earl of Clarendon replies that each Power is and will be the sole judge of the requirements of its honour and of its interests; that it is by no means his intention to restrict the authority of the Governments, but only to afford them the opportunity of not having recourse to arms whenever differences may be adjusted by other means.

“Baron Manteuffel gives the assurance that the King, his august master, completely shares the ideas set forth by the Earl of Clarendon; that he therefore considers himself authorized to adhere to them, and to give them the utmost development which they admit of.

“Count Orloff, while admitting the wisdom of the proposal made to the Congress, considers that he must refer to his Court respecting it, before he expresses the opinion of the Plenipotentiaries of Russia.

“Count Cavour, before he gives his opinion, wishes to know whether, in the intention of the author of the proposition, the wish to be expressed by the Congress would extend to military interventions directed against *de facto* Governments, and quotes, as an instance, the intervention of Austria in the Kingdom of Naples in 1821.

“Lord Clarendon replies that the wish of the Congress should allow of the most general application; he observes that if the good offices of another Power had induced the Government of Greece to respect the laws of neutrality, France and England would very probably have abstained from occupying the Piræus with their troops. He refers to the efforts made by the Cabinet of Great Britain in 1823, in order to prevent the armed intervention which took place at that time in Spain.

“Count Walewski adds, that there is no question of stipulating for a right, or of taking an engagement; that the wish expressed by the Congress cannot in any case oppose limits to the liberty of judgment of which no Power can divest itself in questions affecting its dignity; that there is therefore no inconvenience in attach-

“ing a general character to the idea entertained by the Earl of Clarendon, and in giving to it the most extended application.

“Count Buol says that Count Cavour, in speaking in another sitting of the occupation of the Legations by Austrian troops, forgot that other foreign troops have been invited into the Roman States. To-day, while speaking of the occupation by Austria of the Kingdom of Naples in 1821, he forgets that that occupation was the result of an understanding between the Five Great Powers assembled at the Congress of Laybach. In both cases, he attributes to Austria the merit of an initiative and of a spontaneous action which the Austrian Plenipotentiaries are far from claiming for her.

“The intervention, adverted to by the Plenipotentiary of Sardinia, took place, he adds, in consequence of the discussions of the Congress of Laybach; it therefore comes within the scope of the ideas expressed by Lord Clarendon. Similar cases might perhaps recur, and Count Buol does not allow that an intervention carried into effect in consequence of an agreement come to between the Five Great Powers, can become the object of remonstrances of a State of the second order.

“Count Buol approves the proposition in the shape that Lord Clarendon has presented it, as having a humane object; but he could not assent to it if it were wished to give to it too great an extension, or to deduce from it consequences favourable to *de facto* Governments, and to doctrines which he cannot admit.

“He desires besides that the Conference, at the moment of terminating its labours, should not find itself compelled to discuss irritating questions, calculated to disturb the perfect harmony which has not ceased to prevail among the Plenipotentiaries.

“Count Cavour declares that he is fully satisfied with the explanations which he has elicited, and he accedes to the proposition submitted to the Congress.

“Whereupon the Plenipotentiaries do not hesitate to express, in the name of their Governments, the wish that States between which any serious misunderstanding may arise, should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly Power.

“The Plenipotentiaries hope that the Governments not represented at the Congress will unite in the sentiment which has inspired the wish recorded in the present Protocol.”

(The Signatures follow.)

## APPENDIX X. PAGE 602.

(Extract from a speech of Count Cavour's, delivered in the Chamber at Turin, February 6, 1855.)

“PRIMA di tutto, o signori, il Governo ebbe ad esaminare se la guerra che si combatteva in Oriente interessasse realmente lo Stato nostro,

“ se veramente vi fosse per noi materiale interesse politico a prender  
 “ parte in essa, a concorrere allo scopo che si proponevano di ottenere  
 “ le potenze occidentali. Noi non abbiamo avute molte difficoltà a  
 “ convincerci che la Sardegna era altamente interessata allo scopo  
 “ della presente guerra. Difatti, o signori, se la presente guerra  
 “ avesse esito felice per la Russia, se avesse per conseguenza di con-  
 “ durre le aquile vittoriose dello Czar in Costantinopoli, evidente-  
 “ mente la Russia acquisterebbe un predominio assoluto sul Mediter-  
 “ raneo, ed una preponderanza irresistibile nei consigli d' Europa.

“ Ebbene, signori, sia l' una che l' altra conseguenza non possono a  
 “ meno che riputarsi altamente fatali agl' interessi del Piemonte e  
 “ dell' Italia.

“ Infatti, quando la Russia fosse padrona di Costantinopoli lo  
 “ sarebbe altresì del Mediterraneo, poichè diventerebbe dominatrice  
 “ assoluta del più gran mare realmente Mediterraneo che esista sul  
 “ globo, cioè del mar Nero. Il mar Nero diventerebbe allora un vero  
 “ lago Russo, e quando questo gran lago russo nelle mani di una  
 “ nazione che conta 70 milioni di abitanti diverrebbe in poco tempo  
 “ il più grande arsenale marittimo del mondo, un arsenale al quale  
 “ non potrebbero forse resistere tutte le altre potenze marittime  
 “ (sensazione). Il mar Nero, fatto Russo mediante la chiusura del  
 “ Bosforo, le chiavi del quale sarebbero date in mano all' autocrata,  
 “ diverrebbe in certo modo la rada di Sebastopoli, allargata con pro-  
 “ porzioni gigantesche. Qui forse taluno mi dira: e che importa il  
 “ predominio nel Mediterraneo? Questo predominio non appartiene  
 “ all' Italia, non appartiene alla Sardegna, esso è in possesso dell'  
 “ Inghilterra e della Francia; invece di due padroni il Mediterraneo  
 “ ne avrà tre.

“ Io non suppongo che questi sentimenti trovino eco in questa  
 “ Camera, essi equivarrebbero ad una rinuncia alle aspirazioni dell'  
 “ avvenire, sarebbe un dimostrarci insensibili ai mali onde fu afflitta  
 “ l' Italia dalle guerre continentali, mali che vennero ricordati così  
 “ eloquentemente dal nostro gran lirico moderno, quando parlando  
 “ delle conseguenze delle guerre che combatteansi dai forestieri in  
 “ Italia al cospetto di popolazioni indifferenti al trionfo dei nuovi  
 “ conquistatori, diceva:

‘ Il nuovo signore s' aggiunge all' antico,  
 L' un popolo e l' altro sul collo ci sta! ’

“ Quando la Russia venisse ad acquistare la preponderanza nel  
 “ mar Nero, questi versi certamente si potrebbero con molta oppor-  
 “ tunità applicare a noi.

“ Ma assai più degl' interessi materiali gl' interessi morali sareb-  
 “ bero compromessi dal trionfo della Russia: quando essa venisse  
 “ ad acquistare irresistibile influenza nei consigli europei, è mia  
 “ opinione che il nostro paese, le nostre istituzioni, la nostra nazionalità  
 “ correbbero gravissimo pericolo.”—*Ouvrages politiques-économiques*,  
 par LE COMTE CAMILLE BENSO DI CAVOUR, edition of 1855, page 580.

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